United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED
APR 13 1908
Henry W. Hodges,
Clerk.

Court of Appeals, District of Columbia.

No. 1873.

545

BURTON MACAFEE, Appellant,

vs.

MARY Z. L. HIGGINS, et al.

BRIEF FOR APPELLANT.

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Court of Appeals, District of Columbia

BURTON MACAFEE, *Appellant*,

vs.

MARY Z. L. HIGGINS, *et al.*

No. 1873.

BRIEF FOR APPELLANT.

This is an appeal by the executor from an order of the Probate Court refusing admission and probate to the will of J. Howard Larcombe, deceased, after a verdict by a jury against the will.

Statement of Facts.

J. Howard Larcombe, while domiciled in the District of Columbia, died in December, 1906, leaving a will (R., 1), dated July 27, 1900, duly executed. By the terms of this will he left all of his property to Burton Macafee, to have and to hold, subject to the obligation that the same should be his absolutely to handle and to manage as he saw fit and to pay 90 per cent. of the net annual income divided into two equal parts to the testator's daughter and son, and in case of his son's death to his son's widow. He further requested the said Burton Macafee to purchase the mortgage on a certain farm

standing in testator's wife's name, provided his son and daughter could amicably agree to a division of the farm between them. The will provided that in case either of the children or the husband of his daughter should refuse to abide by the will that they should be deprived of all benefit under it. Burton Macafee was named executor.

After testator's death, the will was offered by the Executor for probate and record (R., 3), and a caveat was filed by testator's daughter alleging want of due execution, fraud, undue influence, and mental incapacity (R., 45). The executor answered denying the caveator's allegations (R., 6, 7) and four issues were accordingly framed (R., 8). At the trial table, the issue as to execution was withdrawn (R., 10), and the court ordered testator's daughter and widow of his son, the caveators, be made plaintiffs, and the executor, the caveatee, be made the defendant (R., 8), and the case was tried on the other three issues. The jury returned a verdict against the will on each of them (R., 8).

The testimony tended to show that the testator had been employed as a clerk in the Pension Office for thirty years before his death in December, 1906, engaged most of the time on very important work. That he had prior to 1902 received a salary of $1,600 and $1,400 per year (R., 15–30) but in December, 1902, he was reduced to $900 (R., 13). His work in the office was adjudicating pension claims and it required judgment, discretion and mental acumen (R., 13, 14, 40, 46). He was engaged on this work until the latter part of 1904, when he was put

to stamping (R., 46), and was last at the office in April or May, 1906 (R., 47).

There were thirteen witnesses produced on behalf of caveators on the question of mental capacity and nineteen on behalf of caveatee. Of caveators' witnesses not one testified to having seen testator even during the month the will was executed, while four of caveatee's saw him on the very day.

Of caveators' thirteen witnesses two of them are the caveators themselves, two are cousins of caveators, one is the husband of one caveator, one is her attorney, and one failed to express an opinion.

The two cousins thought testator was of unsound mind since 1899. The two caveators were of the opinion that he was of unsound mind since 1898, although one had taken contributions from him for the support of her family for many years (R., 32); and the other agreed in 1902 with testator to execute a lease whereby she was to rent his farm (R., 28, 32), and in the early part of 1906 endeavored to have him give her his power of attorney (R., 32), and as late as June 6, 1906, was representing that her father was in a mental condition to verify a financial statement (R., 26, 28), yet she says in May, 1906, he was infantile (R., 32). The husband of caveator never then considered the soundness of his mind, but in the latter years thought him awfully queer and in his dotage (R., 16), yet he had occupied 167 acres of testator's land for twelve years without paying rent, while testator paid taxes and interest on the mortgage (17), the latter amounting to $200 per year. The attorney in

1898 loaned testator some money, which was subsequently repaid, and the attorney did not then form an opinion as to the testator's soundness of mind (R., 34).

Of the other witnesses Colton was of the opinion that testator was of unsound mind for eight years prior to his death, and not capable of transacting business intelligently or doing any work requiring care or thought, though for the past fifteen years witness admitted he had no business transactions with Larcombe except in the Pension Office, and that during part of period witness thought him incapable, testator was adjudicating cases in the Pension Office (R., 13).

Warfield was of the opinion that testator was of unsound mind for a year or two prior to 1902, though he did not know positively in 1900 or even at the time of his death that he was of unsound mind (R., 13).

Doing was of the opinion that for the last 8 or 10 years testator was not altogether sound in mind, and he would have thought a long time before he would have closed a big deal with him though they bought and sold things to one another in small ways some years. Witness would have thought a long time about closing a big transaction with any man as he is not in the habit of carrying through big transactions himself (R., 14).

Blanchard said testator was not of sound mind in 1900 and for some time prior thereto, and his mental condition was such at that time that it was not safe to have any business transactions with him, although testator was doing the same work in Pension Office as witness (R., 14).

Peck had never known a time in the last fifteen years that he would have had any business transactions with Larcombe as he regarded him as mentally incompetent.

Brooks, the appointment clerk of the Pension Office, was of opinion that in July, 1900, testator was not of sufficient mental capacity to execute a valid deed or contract, and he came to that conclusion in 1898, although he had no conversation with him on that subject. The chief of his division rated him "fair," which was third of five grades, or the average grade of clerks in the office (R., 85).

Not one of the witnesses for caveatee, excepting the caveatee himself, was in any way interested in the result of this suit. They were people who knew the testator in nearly every relation of life. Five knew him in his Commandery, four in a business way, three in his church, three in office, two casually, and one was his kinsman.

Mrs. Drummond, clerk in Pension Office, knew testator for 17 years in the office and Commandery and saw him to speak to several times a week. Saw him last year of his life and up to the last time she saw him was of the opinion he was of sound mind (R., 38).

Brown knew testator for 20 years and up to within a year of his death saw him twice a month and talked with him. Thought him a man of strong mind and up to last time he saw him thought he was of sound mind (R., 38, 39).

Conover, a tailor, knew testator for 17 years before his death and saw him often at the Commandery and frequently on the street. Did work for him in 1905. Con-

sidered him a man of strong mind and considered him mentally sound (R., 39).

Sholes, Department clerk, knew testator very well and lived within two blocks of him and they attended the same church. Saw him once in two weeks and frequently had conversations with him. Never saw anything about him that indicated unsoundness of mind and he always thought he was of sound mind (R., 39).

Miss Goff, clerk in Pension Office, worked in same room at Pension Office with testator since 1894, their desks being alongside. Saw him every day and talked with him. Was perhaps more intimately acquainted with him than anybody in office. Engaged on same class of work. That he did not begin to fail mentally until spring of 1902. She was of the opinion that in July, 1900, he was of sound mind (R., 40).

Harris, an attorney, knew him for ten years, and saw him frequently on the street and at Commandery. Saw him the day will was executed, and talked with him. Thinks he was of sound mind up to last time he saw him in the spring of 1906. Never saw anything to indicate mental weakness or forgetfulness.

McBath, chief in Treasury, knew testator for twenty years, and saw him frequently. Saw him during last year of his life, and never saw anything peculiar in his actions, and he was of the opinion that in July, 1900, he was of sound mind (R., 41).

W. E. Allen, patent lawyer, knew him ten years before his death, and saw him the day the will was executed and twice a month part of the time and at other

times six months. Had conversations with him, and never noticed lack of memory or weakness of mentality. That he was of sound mind as long as he knew him. They lived in the same neighborhood. Saw no change in his mental condition in spring of 1906, when he last saw him (R., 42).

Musson, telegraph operator, knew him for eleven years, and saw him frequently at Commandery meetings. Never saw anything to indicate mental incapacity, and thinks he was of sound mind in July, 1900 (R., 42).

Walter Allen, patent attorney, knew him for twenty-five years, and saw him six or seven times a year, and had conversations with him. Never saw anything to indicate mental deterioration. Saw him last year of his life, and saw no change in him mentally. Was of the opinion that in July, 1900, he was of sound mind (R., 43).

Larcombe, Department clerk, a nephew of testator, knew him all his life and saw him on an average of once a month for the last ten years of his life, and frequently conversed with him. Saw him in summer, 1906, and he was failing mentally, but prior to that time he never saw anything to indicate mental weakness (R., 43).

Harrison, Secretary of Building Association, knew testator for 15 years in business way. Lived out in Maryland and frequently in summer met Larcombe on train. Had business transactions with him. Up to last time he saw him in 1906 he saw nothing to indicate unsoundness of mind, and is of the opinion that he was of sound mind in July, 1900 (R., 43).

Gottlieb, Secretary of Corporation, knew him from

1886 to 1903 or 1904, and saw him frequently at church, nearly every Sunday. He talked connectedly, had no defect of memory and was of sound mind (R., 44).

Rhodes, attorney, knew him for 10 years before his death. They attended same church and saw him on an average twice a month and talked with him on church matters. Had business transactions with him. Saw him latter part of 1905. Was of the opinion that he was of sound mind in July, 1900 (R., 44).

Thomas, real estate agent, saw him on four occasions in February and March, 1906, when he was in her office. She talked with him and saw nothing in his conversations and bearing to indicate unsoundness of mind, and she was of the opinion that he was of sound mind (R., 44).

R. Ross Perry, attorney, testified that he could not recall testator, but from seeing his letter (R., 45) he recalls that he went to the Pension Office to see some gentleman in connection with Gas Company stock. He identified his signature to a letter of December 20, 1901 (R., 45), and said had they not been true at that time he would not have made the statements in said letter, viz: that he found him (Larcombe) perfectly capable in every way of attending to his business, and that the reasons for transfer of stock to Macafee were perfectly satisfactory (R., 45).

Balinger, who was a witness to the will, was of the opinion that testator was of sound mind at the time of execution (R., 46).

Wilder, clerk in Pension Office, testified that he knew

testator since 1890, sat close to him in office and was his acting section chief. Testator was engaged in adjudicating pension claims which required judgment and discretion and was so engaged until last of 1904. That some of Larcombe's work came under his observation as witness had to review Larcombe's official correspondence. Larcombe's work was as good as the average clerk up to the last he did. Often had personal and official conversations with him. He was of the opinion that in July, 1900, Larcombe was of sound mind, and up to the last day he was in the office in April or May, 1906, witness saw nothing mentally wrong with him (R., 46).

Only three witnesses testified as to the execution of the will. Of the three witnesses to the will one was dead, one testified that he did not know who was present, and one testified at one time that Macafee was present (R., 10), but at another time that caveatee was not present at the time of execution (R., 46). The caveatee testified that he was not present at time of execution (R., 48).

The will came to the Register of Wills by mail (R., 37). There is no testimony as to who had it in custody between the time of execution and receipt by the Register, except Macafee testified that in January, 1906, testator came to his office with a large bunch of papers and said his will was included; that he did not want to leave them where his daughter could get them, but he did not leave papers with caveatee (R., 48). The caveatee (R., 48) and one of caveators (R., 31) both testified that they had never seen the will until they read it in office of Register.

After the execution of this will there were three business transactions between caveatee and testator, and it is contended by counsel for caveators that these transactions cast a flood of light upon the issues in this case. The evidence relating to them was objected to and the objections will hereafter be considered. The court admitted them without restriction. Briefly narrated these transactions follow:

It was shown by caveatee that in August, 1900, the testator said he was in need of money, and as he could not get his Golden Cross policy payable as he wanted it, and as the monthly assessments of $8.40 were soon to be doubled, he wanted to dispose of it, and caveatee agreed to purchase it and give him $1,090 cash for it, which was done, and after keeping up assessments for over six years caveatee lost $227.50 on the transaction (R., 48, 49). This evidence is not only corroborated by the fact of the delivery of certificate by testator, made payable to Macafee, but also by testimony of Mrs. Drummond, who heard testator say in 1901 or '2 that he had no further financial interest in the Golden Cross, and also by evidence of Harris, who said testator told him in August, 1900, that as it was impossible to get certificate fixed in the way he wanted it, he was arranging to turn it over to Macafee, who was to pay the assessments (R., 40).

It was further shown by caveatee that testator had unsuccessfully endeavored to sell his interest in certain Pennsylvania property, the title to which was in litigation, for $1,250, and thereafter testator said he needed some money, and offered it to caveatee for $1,000, which

offer caveatee accepted, and paid him for same $750 in cash and surrendered to him his note for $250 (R., 50). This sale is corroborated by Wilder, who testified that testator said he had to sell his Pennsylvania property to pay interest on mortgage and meet the demands of the Higgins (R., 46), and also by testator's receipt for $1,000, offered in evidence (R., 34).

It was further shown by caveatee that in the fall of 1901 testator had some stock he wished to dispose of. After negotiations it was agreed that caveatee should give $73 per share for 26 shares of Gas Light Co. stock, which was the market price, and caveatee did purchase it—paid testator cash therefor. For 9 shares of Pennsylvania Railroad stock caveatee agreed to give $72 per share, the prevailing market price, but when testator came to deliver it a few months later, in December, it had advanced, and testator said he should have $75⅔ per share, the market price then. This was agreed to, and caveatee paid him cash therefor. At the same time caveatee bought from testator 62 shares of Metropolitan Coach Co. stock, for which he paid cash $7.50 per share. It was represented by testator that it was paying 6 per cent. dividends, but caveatee never received any dividends, and the company is now in the hands of receivers, who are endeavoring to make caveatee pay an assessment of $5 per share for stock claimed to be due from Larcombe as a stockholder (R., 49).

The stock transaction is corroborated by Mr. R. Ross Perry. He had received a letter from Mr. Larcombe (R., 45), in reference to the gas stock, wherein Larcombe

refers to it as " stock that I (Larcombe) sold him (Macafee) some months ago," and " I (Larcombe) am willing to do what is right and proper to show that I sold him (Macafee) that stock." Mr. Perry then called upon testator and wrote the Gas Co. enclosing testator's letter (R., 45) saying: " I have but now returned from quite a long interview with him (Larcombe) at the Pension Office. He has explained to me satisfactorily the Meloy transfer and also the reason for his present transfer to Mr. Macafee. I find him perfectly capable in every way of attending to his business, &c." (R., 45).

Again it is corroborated by Mr. Larcombe in his own letter to caveatee when he said: " When *I sold you that gas stock*, it was the last thing of market value that I owned" (R., 52).

On account of errors committed by the court in the admission of evidence and in the granting and refusing instructions to the jury, the case is now brought to this court for review. And while this court has held that if the verdict of the jury on any one issue can be sustained by the evidence it will not be disturbed, yet it is submitted with confidence that a consideration of the record will disclose that the errors of the court as to some of the issues worked great prejudice and harm to caveatee's case on others so that the jury could not with calmness and without bias return a fair verdict.

Assignment of Error.

The court committed error in the following particulars:

1. In admitting in evidence benefit certificate of insurence in Golden Cross.

2. In admitting in evidence papers relating to change of beneficiary in benefit certificate.

3. In the admission of correspondence between Mrs. Higgins and Burton Macafee.

4. In refusing to direct jury to disregard correspondence between Mrs. Higgins and Burton Macafee.

5. In admitting in evidence the letter of Pennsylvania Railroad, dated January 12, 1907, as to transfer of railroad stock.

6. In admitting evidence as to transfers of Washington Gas Light Company stock.

7. In permitting Mr. Ford to testify as to Burton Macafee's alleged statement as to purchase of Altoona property.

8. In permitting Brooks to testify as to his opinion of testator's capacity to execute a deed or contract.

9. Refusal of court to direct jury to disregard Brooks' opinion of testator's mental capacity because it was based partly on hearsay.

10. Refusal of court to direct a verdict on the issues of fraud and undue influence at close of caveators' case.

11. Refusal of court to strike out testimony as to Golden Cross transactions, Altoona property transfer, Gas Light stock, and of Pennsylvania Railroad stock.

12. Refusal of court to direct a verdict on issues of fraud and undue influence at close of all the testimony.

13. In granting caveators' second instruction:

14. In granting caveators' fourth instruction.

15. In refusing to grant caveatee's first instruction.

16. In refusing to grant caveatee's fourteenth instruction.

17. In refusing to grant caveatee's twenty-first instruction.

18. In refusing to grant caveatee's twenty-second instruction.

First and Second Error.

The court over objection of caveatee admitted in evidence a copy of the Benefit Certificate in the Golden Cross dated March 29, 1894, payable to Mary Z. L. Higgins. Counsel for caveators then offered in evidence certain correspondence purporting to have passed between testator and the officers of the Golden Cross relative to the change of beneficiary under said certificate. The correspondence showed that testator on July 27, 1900, the day the will was executed, applied in the usual form to have his certificate made payable to his son and daughter according to the terms of his will; that this was refused by the officers of the Golden Cross as it could not be done under the laws of the order; on August 11, 1900, the testator in the usual way had the certificate made payable to Burton Macafee (R., 20–25).

This testimony was offered on the issues of fraud and undue influence and was objected to as irrelevant unless

the caveators proposed to connect the caveatee with the said change or the preparation or execution of said papers (R., 20). No such evidence was offered by caveators, but they endeavored to show it by witnesses for caveatee. Harris (R., 40) and Allen (R., 42), who were witnesses to the papers, both testified that they did not know who prepared them, and the caveatee (R., 48) testified that he had nothing to do with procuring the change of beneficiary under the policy (R., 48) and did not prepare the affidavits and application, and he did not know who did (R., 54). That about August 1, 1900, Larcombe said he wanted to dispose of his policy as he had been unable to get it made payable as he wanted it, and as the assessments were soon to be doubled he could not keep it up. Caveatee told him if he would have it made payable so caveatee could get the money on it he would pay him $1,000 for it and keep up assessments from that date (R., 48).

It is respectfully submitted that this was all the testimony adduced to connect caveatee with the transaction. It does not seem to be relevant even under the most liberal construction of the rules of evidence to prove fraud or undue influence. None of these facts tend in the most remote degree to establish the issues submitted to the jury, and are absolutely without probative value in the case.

The question for the court was: Is the testimony, in the main, so connected with the decisive points in controversy as to be more likely to aid the jury in coming to a just and reasonable conclusion thereon than to con-

fuse and mislead them? If this testimony, considered by itself was calculated to create a prejudice against the caveatee and his cause and in favor of caveators, who were women, in the minds of the jury, which might have had an undue influence upon the general verdict, then the objection should have been sustained. These facts are remote and collateral and are, therefore, inadmissible. They are not so remote in point of time, but they are in point of causation and relation to the questions at issue.

Third and Fourth Error.

Certain correspondence between Mrs. Higgins, one of the caveators, and Macafee, was offered in evidence by caveators (R., 25). This correspondence was dated nearly six years after execution of will, and the theory of the offer was not explained by counsel. It was objected to by caveatee on the ground of immateriality and irrelevancy and because it contained statements that might prejudice caveatee's case, which the jury would accept as facts. The court thought it competent if it referred to the will, whereupon the court's attention was called to the fact that there was no reference to a will except in one letter of caveatee, and that did not show it referred to the will in controversy. But the court overruled the objection and counsel noted an exception (R., 25), and the correspondence was read to the jury. After the reading of the correspondence caveatee again called the attention of the court to its immateriality, and moved the court to direct the jury to disregard it, which the court refused to do and an exception was noted (R., 29).

The correspondence contains statements and references that could never be given in evidence under the issues in the case. The substance of these statements is as follows: that the associates of the testator in his office had told his daughter that he had been for three years past mentally incapable of doing business; the restatement of conversations that had theretofore passed between Mrs. Higgins and Macafee not in the nature of admissions and not relating to the will; that caveator had asked caveatee for a plain statement of the fact that he had funds of her father in his possession to pay his Golden Cross dues, and that he had no lien on his policy; that caveator had requested a statement in writing that the Pennsylvania property was transferred to caveatee as a matter of convenience in adjusting same; that caveator's father would never charge her with taking money out of his pocket if he were in his right mind; that caveatee said that testator said that caveator had taken money out of his pocket; that the husband of caveator, a witness in the case, was a good, honest man, whose word was his bond, which could be proven by a score of witnesses in Washington; that the impression of persons in a position to judge was that caveator had been and was a good daughter, and the remarks of other persons as to caveator's patience with testator.

The admission of this correspondence brought before the jury hearsay evidence, as associates of caveator's father told her that he had been for three years past mentally incapable of doing business; immaterial and irrelevant conversations between caveator and testator;

evidence as to the good character of a witness, when his reputation had not been assailed.

All of the incompetent evidence referred to above is contained in the two letters of June 5, 1906 (R., 25–6) and June 6, 1906 (R., 26–8). The letter of June 9, 1906 (R., 29), which contains the reference to the will, is complete in itself, and in no way is dependent upon the other letters for a thorough comprehension of its contents. That one letter refers to a material fact in the case does not make the whole correspondence competent, especially where the other letters do not explain or qualify the letter offered. Correspondence about other matters would be immaterial. Neither do the first two letters contain any competent testimony throwing any light upon the issue of fraud, undue influence or testamentary capacity. If it be contended that the two letters of caveatee were admissible as containing admissions, it is answered that they alone should have been admitted, and the caveatee would then, if he were so advised, be entitled to offer caveator's letter. The law relating to the admission of such evidence is well stated in the leading case, that has been ever since followed, of (1838) Prince *vs.* Samo, 7 Ad. & E., 627, where the doctrine is laid down as follows:

> "Where the statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would in any way qualify or explain that statement, is admissible; but detached and independent statements, in no way connected with the statement given in evidence, are not admissible."

Jones on Evidence, Sec. 295, states the doctrine very clearly in this way:

> "Although it is a familiar rule that when a part of a conversation or admission is introduced, the other party may prove the rest of such statement, *yet the rule is limited to such statements as would in any way qualify or explain the part first given.* When a conversation about a given matter is introduced the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation."
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> (1879) Platner *vs.* Platner, 78 N. Y., 90, 103.
> (1871) Downs *vs.* R. R., 47 N. Y., 83, 88.
> (1875) Miller *vs.* Wildcat, 52 Ind., 51, 62.
> 82 Am. Dec., 342.

Fifth and Sixth Error.

The caveators then offered a letter purporting to be from the Pennsylvania railroad showing that 9 shares of the company's stock, registered in name of Elizabeth P. Larcombe, were transferred to Charles L. Frailey, October 5, 1899, by J. Howard Larcombe, administrator, and during the same month transferred to J. Howard Larcombe individually, and on December 13, 1901, transferred by J. Howard Larcombe to Burton Macafee. Objection was made to this letter by caveatee on the ground of irrelevancy unless counsel would offer to show then or later that said transfers were fraudulent or obtained upon an inadequate consideration. The letter was admitted and an exception was noted (R., 30).

Counsel for caveatee agreed to admit for the purpose of this suit that 26 shares of Gas Light stock had been transferred by the testator to Burton Macafee on December 21, 1901, provided the court should deem it material, but objected to the evidence on the ground of its immateriality, irrelevancy, and incompetency. Objection overruled and exception noted (R., 30).

The theory of caveators upon which this testimony was offered and the ground upon which it was admitted by the court, are not disclosed by the record. The testimony seems to have been offered and admitted for the sole purpose of showing the transfer of the stock without in any way offering to prove its relevancy to the issues by showing that such transfer was in any way connected with the execution of the will, mental incapacity, fraud, inadequate consideration, or undue influence. This transfer took place nearly eighteen months after the execution of the will, and the delivery and transfer of the stock, which was established by this evidence, raised a presumption of the good faith of the transaction, which caveators should have offered to attack by later evidence, before it should have been received by the court.

Seventh Error.

Counsel for caveators then offered to show as declaration against interest that, since the filing of the caveat Burton Macafee, in a conversation with one of caveators' counsel, said that he had bought the Altoona property from testator and paid him cash for it. Ca-

veatee objected that such evidence was immaterial and irrelevant and did not show or tend to show undue influence or fraud in procuring the will. Further objection was made unless counsel proposed to show that an inadequate price was paid. Objection overruled and exception noted (R., 34).

As a declaration against interest this testimony could not be admitted, because the very foundation of the admission of such declarations is death or absence signifying the impossibility of obtaining other evidence from the same source, it being supposed that the declarant is unavailable in person on the stand. Wigmore on Ev., Sec. 1456. But in the case at bar the declarant was present in court and subject to be called to the stand. The prejudice suffered by caveatee was that caveators resorted to this improper and illegal method of getting the fact of purchase of the property before the jury in order to avoid calling caveatee to the stand, in which event they would be bound by his testimony. If he were available as a witness, then his hearsay declarations against interest could not be admitted.

But the declaration offered was not shown to be against interest. At the time of the conversation neither the court nor the jury were advised as to what preceded or followed the declaration and what were the circumstances under which the admission was made. There was nothing offered in the way of evidence to show an essential prerequisite, viz: That it was to the interest of declarant at the time to say to the contrary. Wigmore on Ev., Sec. 1459. Such a condition might have existed

had the declarant predicated of himself a limited estate in the property instead of a complete title. Wigmore on Ev., Sec. 1458.

But assuming that the declaration as such was competent to prove the fact, it does not seem relevant in any way to establish any of the issues. That at some time caveatee purchased property from testator does not, without more, such as proximity as to time of date of will, inadequacy of price paid, showing fraud or other advantage taken, prove or tend to prove the issue submitted to the jury.

Eighth Error.

Caveators asked a witness, from what he observed of Larcombe "would he say that in July, 1900, he was capable and was of sufficient mental capacity to understand and execute a valid deed or contract." This question was objected to on the ground that this was a question for the jury to determine and not for the witness. The objection overruled and exception noted (R., 35).

It will be noticed that the question propounded was so framed as to call for an expression as to witness' opinion of testator's legal capacity to execute a deed, not as to his *sanity or insanity.* A question endeavoring to elicit opinion as to the latter condition would have been free from objection. By comparing the question with the fourth issue (R., 7), viz: "was testator of sound and disposing mind and capable of executing a valid deed or contract?" it will be seen that the question asked the

witness was couched in almost the identical language as the issue submitted for the jury's determination, so that the witness and the jury were called upon to answer the self same query. Such questions and answers permit the witness to invade the province of the jury, and is not tolerated by the law. Text writers and the cases observe a marked distinction between the expression of the witness' opinion as to the testator's mental condition on one hand and his legal capacity on the other. The witness may pass upon the former under certain conditions, but the latter is within the exclusive province of the jury, under instructions from the court. The reasons assigned for the position are that it assumes the witness knows the degree of capacity which the law requires for the execution of a will, or if he uses the language of the law he may be misled himself as to his knowledge, or may mislead the jury. But, further, it involves a question of law and fact, and is a matter of applying a legal definition to the data of the testator's mental condition as detailed by the witness. The jury and not the witness must apply this data when presented, under the court's instructions (Wigmore on Ev., 1958).

The rule adopted by the trial court is far-reaching in its effect, and the question here raised is one of some importance in this jurisdiction, for it must follow that if a witness can express his opinion as to the legal capacity of a testator to make his will, then such opinion is admissible whenever the question of legal capacity arises as to notes, deeds, and every species of contract, and every witness, however ignorant of what the law

requires in order to establish the required capacity, can express his opinion.

The most thorough case on the subject that has been found is (1895) Brown *vs.* Mitchell, 88 Texas, 350, 36 L. R. A., 64, and note. There the precise question for decision as stated by the court was: "Can a witness, whether he be a subscribing witness to a will, an expert, or any person familiar with the facts from personal observation, testify before the jury that the testator had or had not capacity to make a will?" The court in answering this question in the negative overruled three former decisions of that court and reviewed the cases on both sides of the proposition. In the course of the opinion the court said:

> "Under the same ruling, if a physician had been called upon the stand, and these facts had been stated to him as a hypothetical case, he might have given it as his opinion that the testatrix had capacity to make the instrument; whereas, in case a lawyer of learning had been placed upon the stand and had been asked the same question upon the same state of facts, he would not have been allowed to give his opinion. Such a rule involves the absurdity of permitting those who are ignorant of the law to give an opinion as to what the law requires, while it excludes the opinion of the only class who may be supposed to be able to give an intelligent opinion on the subject. We think the authorities cited, upon established and sound principle of law, will maintain the conclusion as correct, that no witness will be permitted to testify to a legal conclusion from facts given, either by himself or testified to by

another. It is the province of the jury, from the testimony, to find the facts; but it is the duty of the court alone to inform the jury as to the rule of law by which they are to be governed in determining upon the sufficiency of the facts given to them by the witnesses. The conclusions or opinion to which witnesses may testify in this character of cases are simply to be treated as facts presented to the jury by means of the conclusions drawn by the witnesses from their observations, for the reason alone that the facts are of such character that they are incapable of being presented, except by stating conclusions drawn from observation."

In a case where a will was contested on the grounds of incapacity and undue influence the trial court permitted certain witnesses to answer the question whether or not in their judgment, at the time of execution of the will, testator was able to make a last will and testament. On appeal this was held alone to be reversible error, and the court said:

"The question required the witnesses to usurp the functions of both court and jury, because it required them to determine the degree of mental capacity required to make a will, which is a question of law; and whether the testator, when the will was made, was possessed of such capacity, which was the principal issue for the jury to determine."

(1907) Cheney *vs.* Cheney (Neb.), 110 N. W., 731–2.

In a will contest, where undue influence and incapacity were charged, the court permitted non-expert witnesses

to testify that testator was of unsound mind and incapable of intelligently transacting business or disposing of his property. The court, in reversing the lower court on this ground, said:

> "The ultimate question for the jury to determine was whether the testator had sufficient mental capacity to dispose of his property by will at the time the instrument was executed, and this precise question was, in effect, answered by the witnesses, to whose testimony we have referred. So far as the questions and answers related to the time of making the will, or to a time so closely approximating thereto as to amount to the same thing, there was error in receiving the testimony for the reason that the ruling permitted the witness to testify, in effect, that the testator was capable of making the will in question, and such testimony is incompetent under the rule of our own decisions and by the weight of authority."
>
> (1905) Glass *vs.* Glass, 127 Iowa, 646–9.

In a will contest involving testamentary capacity, the question was whether witnesses, not medical experts, or subscribing witnesses, would be allowed to express an opinion as to the capacity of an alleged testator to make a valid deed or contract. Objection to this question had been sustained in the trial below, and upon appeal in affirming this ruling and referring to cases seemingly sustaining the opposite view, the court said:

> "Without referring specifically to the facts of these cases, it will be seen in all of them the persons whose wills were questioned were in good

> physical condition, and the question was one of *sanity* or *insanity*, not a question of testamentary capacity, dependent upon physical exhaustion merely, or the obscuration of the mental faculties upon the near approach of death."
>
> (1905) Struth *vs.* Decker, 100 Md., 368, 78.

In a case where the question was whether a party was of sound mind and capable of managing her estate, the court permitted witnesses to be asked, if from their acquaintance with the party and the facts related to the jury, whether or not she was, in their opinion, a person of unsound mind so as to render her incapable of conducting the ordinary affairs of life and render her subject to her own folly or the fraud of others? On appeal it was contended this was error. The Appellate Court in reversing the lower court for the admission of this illegal evidence alone said:

> "An opinion may not be given upon the point which it is the duty of the jury to determine. (124 Ind., 212; 92 Ind., 464.) * * * We have said that this issue was for the jury, and that opinion evidence was not competent to go to the jury upon which to make a decision of this issue. The authorities sustain this view. * * * We conclude that the question asked and answered invaded the province of the jury."
>
> (1892) Hamrick *vs.* Hamrick, 134 Ind., 324.

In a will contest caveator asked witness to state what was his opinion of testator's sanity on the evening he was called upon to witness the will or his capacity to

make a will. Objection was sustained and error assigned. The Appellate Court in affirming the action of the trial court said:

> "The question called upon the witness to state what his opinion was as to *the capacity of the testator to make a will.* This branch of the inquiry involved a question of law and fact, and, to the extent that capacity was involved in the issue, the very question to be determined by the jury. It, furthermore, assumed that the witness knew the degree of capacity which the law required for the performance of the act of executing a will."
>
> (1864) Runyan *vs.* Price, 15 Ohio St., 1, 14.

Plaintiff contended he had a right to ask the witness this question in a will contest, viz: "From your knowledge of testator did you think his mind sound enough to make a will?" Objection was sustained and, upon appeal, the court said:

> "The question is objectionable as tending to elicit from the witness his opinion as to the *quantum* of intelligence, or mental capacity, that is necessary to enable a party to make a legal disposition of his estate. In other words, it involves a question of law for the court to determine, and not the witness."
>
> (1862) Farrell *vs.* Brennan, 32 Mo., 328, 34.

But it may be contended by counsel for caveators that although this evidence was improper, yet it was not of sufficient consequence to constitute reversible error. This position cannot successfully be defended. The

evidence admitted was beyond question illegal. The Supreme Court of the United States decided in the case of (1894) Waldron *vs.* Waldron, 156 U. S., 361–80, that it is elementary that the admission of illegal evidence, over objection, necessitates reversal. Besides the witness who expressed this opinion occupied a high and influential office in the Bureau of Pensions, that of Appointment Clerk, and Assistant Chief Clerk from 1897 to 1903, had known testator intimately for 20 years, and subsequent to 1897 saw him almost daily, and had conversations with him (R., 35).

The opportunities of the witness to observe testator and his official position must have commanded the attention of the jury, and in a case where the testimony was conflicting and the verdict in favor of the party who produced only two-thirds as many witnesses as the other side on testamentary capacity, and one-half of that number were shown to be interested, it cannot be said that the admission of this witness' opinion on one of the vital issues in the case was harmless error. Of the cases cited on this branch of the subject seven of them were reversed for this error alone. The reasoning of some courts as to the effect of such evidence will be given.

In a case where such an opinion was allowed to be stated the Appellate Court reversed the trial court for this error alone, and said :

> " It has been suggested that the jury would give no weight to such evidence, and consequently that its reception was error without prejudice. The suggestion is entirely without merit. On whatever

theory, or at whatever stage of the trial it was received, it went to the jury under the sanction of the court as part of the evidence in the case. No one can say with certainty that it was not considered or had no weight with the jury. They were instructed to weigh the evidence, and the presumption is they did so. While such evidence wonld have little weight with some men, it appeals strongly to a style of mind—by no means uncommon—ready to accept any solution of a problem offered rather than undertake an independent investigation."

(1907) Cheney *vs.* Cheney (Neb.), 110 N. W., 731–2.

In a case where the question was whether or not a party had sufficient mental capacity to make a valid contract when she effected a compromise with a railroad for personal injuries, two physicians were allowed to state in their opinion plaintiff was not capaole of making a contract. The Appellate Court in reversing the lower court for this error alone said :

"This was error. The testimony was clearly incompetent, and should have been excluded. The degree or *quantum* of mental capacity which the party whose act is called in question must have, to enable him to make a valid contract, is a question of law for the court to decide, and whether said party has the required *quantum* is a question of fact to be found by the jury from all the evidence; and the opinions of witnesses are not competent evidence, in cases of this kind, upon either point. The mental capacity of the plaintiff to contract was also the direct point—practically the sole point—to be

decided by the court and jury; and the admission of this testimony was, in effect, a substitution of the opinion of the witnesses upon both the law and the facts of the case for that of the triers provided by law to determine them. This cannot be done. The testimony of witnesses must relate to the facts, and it is the province of the court to determine the law, and the jury the ultimate facts. Witnesses, in cases involving mental capacity, after stating the facts within their knowledge, may give their opinion, formed from these facts, of the soundness or unsoundness of the mind of the party in question, but cannot be permitted to express an opinion whether such party had sufficient mental capacity to make a contract or execute a will, as the case may be. There seems to be little or no conflict in the authorities upon this subject. * * * This testimony was clearly prejudicial to the plaintiff in error. * * * (The testimony) with other potent facts testified to by the witnesses for both parties, made the case critically close upon this issue for the defendants in error. The incompetent testimony had been called sharply to the attention of the jury by the objection made to it and overruled, and was upon the direct point being tried, and necessarily must have had great weight with the jury in arriving at its verdict."

(1904) Railroad *vs.* Brundige, 114 Tenn., 31, 4, 8.

In a damage suit the trial court, over objection, permitted an expert witness to say, in his opinion, whether or not it was prudent to operate an elevator in a certain way. The court, on appeal, in holding this was error, said:

"While it may be difficult to fix the exact line between competent and incompetent expert testimony, yet we think it clear that in no case can the witness be allowed to give an opinion upon the very issue involved. To permit this would be to substitute the opinion of the expert for that of the jury, whose duty it is to find the facts, and whose verdict is only an expression of their deduction from these facts."

(1897) Bruce *vs.* Beall, 99 Tenn., 303, 14.

In a case where the issues were fraud, undue influence and testamentary capacity, a witness was permitted to express his opinion as to whether testator had sufficient mental capacity to make a will or contract and to know and understand what he was doing. This was excepted to, and the Appellate Court said that such capacity is not a simple question of fact, but a conclusion which the law draws from certain facts, and that it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a will, for that question is addressed to the jury. The court reversed the case on this error alone. The opinion was expressed in a deposition, and the objection was not urged until the trial.

(1859) Walker *vs.* Walker, 34 Ala., 469–72.

In a will contest where the issues were undue influence and testamentary capacity, a witness, over objection, was allowed to express his opinion of testatrix's mental capacity. For this error alone the Appellate Court granted a new trial saying it was error to take the

opinion of the witness upon a question of law. The court said that there is a growing tendency to leave the question of legal capacity to witnesses rather than to juries, which aids materially the practice of setting aside wills for insufficient reasons, which it facilitates, and which an adherence to the correct rule might retard.

(1903) Page *vs.* Beach, 134 Mich., 51.

Thus where one witness expressed an opinion that a proposed change in the location of a highway would be of public utility, it was urged that the error was harmless, but the court reversing the trial court for that error alone said:

> "The testimony was concerning an important and material point in the case, the question the jury were required to determine, and we cannot say that it did not influence them in the verdict. The evidence was incompetent, and as it was directed to the point in issue in the cause, will be presumed to be prejudicial unless the record shows the contrary."
>
> (1895) Johnson *vs.* Anderson, 143 Ind., 493, 4.

> "What is sufficient capacity to transact business, or to make a will, is a matter of law, depending somewhat upon the nature of the business. A witness may not correctly apprehend the rule of law, and if he uses such expressions may be misled himself, or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter."
>
> (1862) Fairchild *vs.* Bascomb, 35 Vt., 398, 416.

> "By all courts a mere abstract statement that the person was or was not 'capable' of making a will or a contract or a deed seems to be held improper."
> Wigmore on Evidence, Section, 1958.

To state whether a testator is capable of making a will is therefore improper.

Greenleaf on Ev., Sec. 441.

In a case where the issues were fraud, undue influence and testamentary incapacity a witness was asked, from what she knew and observed of testator, whether or not, in her judgment, he was capable at the time of making a will. Over objection she answered in the negative. On appeal the court said that this was error because the question involved a question of law as well as of fact, and was in the case the very thing for the jury to determine from the evidence and under the instructions of the court. And while the court thought evidence relating to certain fraudulent representations justified the verdict on that issue, yet the court could not say that the issues were so entirely independent of the one relating to testamentary capacity that the jury may not have been influenced in its findings on that issue by the erroneous evidence admitted, and therefore it could not be said, upon the whole case, that the error was harmless, as the jury may have in a great degree based their finding upon his want of capacity. For this error alone the case was reversed.

(1891) Estate of Taylor, 92 Calif., 564–66.

Upon trial before a jury of an issue *devisavit vel non* the

lower court was reversed for the *error alone* of permitting a witness to reply to the question whether, on the day of the execution of the will, he thought testator was capable of making a will, because the inquiry involved a question of law and fact, and was the very question to be determined by the jury, and was entirely illegal. The court said it could not tell what effect might have been properly produced if the court had acted on the opinion expressed.

Gibson *vs.* Gibson, 9 Yerg., 329–32.

In an action to set aside a deed on the ground of fraud and undue influence a witness was asked whether the grantor could be easily influenced when he made up his mind. He was allowed to answer over objection that he could not and that no power on earth could influence him. The Appellate Court held this was reversible error because it transcended the limits prescribed by the ordinary witness in delivering an opinion which if concurred in by the jury was the very question to be determined by them. The court said the testimony was incompetent because it was not a statement of an impression or opinion which inexperienced or untrained men are considered by the law competent to form from association and observation. For error alone in admitting this testimony a new trial was granted.

(1895) Smith *vs.* Smith, 117 N. C., 326.

Ninth Error.

At the conclusion of the reading of the deposition of Brooks, the court's attention was call to the fact that on cross-examination it was shown that the opinion of deponent as to testator's mental capacity was formed in part from reports of the chief of his division and his record as a clerk, and as none of these came to him in a personal way his opinion was based on hearsay evidence, and counsel for caveatee moved the court to direct the jury to disregard witness' opinion that Larcombe was incompetent and incapable of executing a valid deed or contract (R., 37).

The witness on cross-examination testified that his opinion was not based entirely on conversations with testator, nor entirely upon writings or the records of the Pension Office, but upon both. That his opinion was based upon so much of the record as is a matter of record in the Pension Bureau and from conversations and observations. Witness never had to review any of Larcombe's work. The chief of Larcombe's division was required to make reports to the Commissioner of Pensions and such reports came to witness as Assistant Chief Clerk. None of the information witness had as to his record came to him in a personal way. The conversations were always about testator's health and about his son (R., 36).

The motion should have been granted for two reasons, viz: (*a*) the opinion of witness was based in part upon hearsay evidence; (*b*) the objection was seasonably taken,

since illegal or irrelevant testimony may be stricken out at any time, even after party has rested.

(*a*) The testimony shows conclusively that all the knowledge Brooks had upon which his opinion was based was gained by observation, conversations and from information as to the testator's record as a clerk in the Pension Office. Was the latter such personal knowledge as to justify the formation of an opinion or was it hearsay and therefore improper? The witness said none of the information he had as to testator's record came to him in a personal way, and he never had to review any of testator's work. So his knowledge on this subject was gained from written records in the Pension Office that seem to have been reports made by testator's Chief of Division, which came to witness officially. These reports were not offered in evidence, the jury were not advised as to what they contained, and did not know whether they were daily memorandum of the amount of physical work testator could do or whether they were annual reports of the opinion of the Chief of the Division as to testator's mental efficiency; or how much, how well, or how poorly testator did his work. Before a non-expert can express his opinion on such matters he should state the facts on which his opinion is based, which facts should be within his own knowledge and observations of the person's appearance (Jones on Ev., Sec. 366), for it is necessary for the jury to know on what facts the opinion is founded, for its pertinence depends upon whether the jury find the facts on which it rests (38 Vt., 454). The cases are in accord with this view.

A witness was asked to state his opinion as to the accused's sanity from all he knew, observed and *heard.* Over objection the witness was allowed to answer. The Appellate Court, holding this was error, said :

> "In the present case the witness gave an opinion which may have been based, in whole or in part, upon what *he had heard* of the defendant, and we think it should not have been received. * * * In the present case the expert witness testified as to his opinion, based, to how great an extent does not appear, upon what he had heard. The jury had no possible means of knowing whether his opinion was not based upon an assumption of the truth of rumors or reports which the jury did not believe to be true, or of whose truth there had been submitted to them absolutely no evidence. It is therefore clear that the question was improper, because it allowed an opinion based upon what the witness had heard of the accused, and that the evidence was inadmissible. * * * That error was in itself sufficient to grant a new trial."
>
> (1898) Flanagan *vs.* State, 106 Ga., 109–11.

An expert was asked to state his opinion as to the malady of a patient according to symptoms given by a witness. The expert answered that he had heard the testimony of the witness, and that the witness had made a statement of the case to him the day before. This was excluded and the ruling affirmed on the ground that a witness cannot testify to an opinion formed upon information derived from private conversations.

(1884) L. N. A. *vs.* Shires, 108 Ill., 617–30.

An expert cannot be allowed to give his opinion upon a case based upon statements made to him by parties out of court and not under oath.

(1878) Hurst *vs.* R. R., 49 Iowa, 76, 9.

Greenleaf on Evidence, Sec. 440.

In a case where a physician was asked to state his opinion of a patient's sanity from symptoms he discovered upon examination and from *what he had been told* by the attending physician, the wife and nurse of the patient, the court sustained the objection to the question and the Appellate Court said:

> "They were declarations of parties competent to be witnesses, unaccompanied by any acts pertinent to the issue then before the court. Those declarations, if they related to facts within the knowledge of the persons making them, could only be proved by those persons themselves. As proposed to be proved, they were clearly within the description of hearsay evidence, and were properly excluded."

(1858) Heald *vs.* Thing, 45 Maine, 392–4.

The opinion of an expert and its value depends upon the view the jury may take of the facts to which witnesses have sworn. They cannot be based upon any facts which the expert *may have heard outside*, and may believe to be credible."

(1880) Polk *vs.* State, 36 Ark., 117–24.

In a will contest the court said the opinion of the non-expert witness as to testamentary capacity must not be founded upon the testimony of other witnesses,

nor upon hearsay, nor upon a hypothetical case, but it must be founded upon his own observation.

(1882) Appleby *vs.* Brock, 76 Mo., 314–18.

This ruling of the court in admitting an opinion formed partly from improper data falls clearly within the condemnation of the Supreme Court of the United States in Throckmorton *vs.* Holt, 180 U. S., 552, where non-experts were permitted to give their opinion of the genuineness of handwriting founded partly upon knowledge and familiarity with the legal attainments, the style, and composition of the individual whose handwriting was in controversy, and partly from their familiarity with the testator's handwriting. And although the trial court realized its error and directed the jury to disregard these opinions, yet the Supreme Court said the admission of such testimony was error, and a subsequent direction of the court to the jury to disregard it was not sufficient to remove the impression and cure the error.

(*b*) Counsel for caveators contended below that the objection should have been made at the time the deposition was taken. This position would have been unanswerable had the objection been directed to the form of the question. It was necessary in this case that the court should hear the testimony in order to see that it was hearsay before the reason for the objection was made apparent. The object of the law in requiring objection to a question in a deposition to be made at the time of taking is to call the attention of the opposite party to the matter so that he may cure the objectionable

feature. Manifestly such a reason could not apply in the present case, because no remedy could convert this hearsay into direct testimony and make it competent. The courts have passed on this question.

In a suit for breach of warranty of a slave, the deposition of the physician who attended her in her last illness was taken, and he was asked to state anything further that he knew, and, without objection, detailed the history of two other cases he had treated for the same disease. At the trial this answer was objected to and was excluded. The action of the court was assigned as error. The court said that it was not necessary to move the exclusion of such proof before trial; that it is the duty of the court, in any stage of the case, to exclude from the jury illegal proof.

(1854) Bush *vs.* Jackson, 24 Ala., 273, 5.

In action upon an insurance policy and trial by jury, a deposition was taken and witness was asked whether he remembered the occasion of the death of insured's maternal grandfather. The witness replied in the affirmative and detailed some of the circumstances without objection. At the trial this was excluded and the Appellate Court said:

> "The court properly excluded so much of Dr. Campbell's answer to interrogatory five as related to the manner of Atherton Hall's death. It is fairly apparent from the answer, especially when read in connection with other parts of the deposition, that it was hearsay. But counsel contended that if there was any uncertainty in regard to this, the ad-

verse party should have called attention to it at the time of taking by a specific objection, so that the uncertainty could have been removed by further inquiry. We think, however, that it was the duty of the party taking the testimony to see that enough appeared to show its competency, and that a specific objection before the magistrate was not required to entitle the plaintiff to raise this question on trial."

(1897) Clark *vs.* Assurance Co., 72 Vt., 458, 62.

In a suit for damages for personal injuries before a jury testimony was taken by deposition, and a witness was asked, without objection, if a turn-table was dangerous. But at the trial this testimony was objected to. The Appellate Court said:

"The fact that no objection was interposed in the commission would not be sufficient to prevent objection at its opening on the ground that the testimony was already in the case without objection."

(1885) Bridger *vs.* Railroad, 25 S. C., 24, 26.

In a case where testimony was taken by deposition and trial had before a jury objection was made at trial to the answer of witness that it merely stated his opinion. It was overruled by the court below. The Appellate Court said:

"This was the opinion of the witness, and not being responsive to the interrogatory the objection was well made at the trial."

(1900) Moore *vs.* Monroe, 128 Ala., 621, 24.

If evidence is inadmissible because it is hearsay, or

because it is secondary in its character, or because it is irrelevant, these are objections which might be taken if the witness were present before the court, and not objections going merely to the form and manner of taking the deposition. Such objections to deponent's answers are well taken at trial.

(1874) Woosley *vs.* McMahan, 46 Tex., 62, 64.

Questions and answers relating to matter of opinion or of law, may be objected to when offered; such objections do not relate to the manner and form of taking and returning depositions. A question and answer eliciting merely the conclusion of the witness as to a matter of opinion or of law was held not admissible, and that objection made thereto when the depositions were offered should have been sustained.

(1876) Purnell *vs.* Gandy, 46 Texas, 190.

A motion to suppress testimony taken by deposition, which is wholly incompetent, may be made at the trial.

(1852) Boykin *vs.* Collins, 20 Ala., 230, 34.

Incompetent testimony in a deposition, although not objected to when the deposition is taken or when it is read, may properly be objected to at any stage of the trial by motion to exclude or by motion to strike out after the party reading it has rested.

(1886) Sailors *vs.* Nixon, 20 Ill. App., 509, 15.

Statements in a deposition which are not legitimate evidence, like hearsay, or opinion evidence may be ob-

jected to at the trial. An objection that an answer is illegal, irrelevant, or incompetent may be taken even after the trial has begun, since the practice is well settled that illegal and irrelevant evidence may be assailed by a general objection and excluded at any stage of the proceedings.

13 Cyc., 1018, 19.

Tenth Error.

Counsel for caveatee asked the court to direct the jury to return a verdict for caveatee on the issues of fraud and undue influence at the close of caveators' case, and upon refusal an exception was noted (R., 38). It has recently been decided by this court that where there is no evidence tending to support the charges either of fraud or undue influence, the court should direct the jury to return a verdict on each of those issues in favor of the will. (Morgan *vs.* Morgan, 36 Law Reporter, 134, 5.) An examination of the record in the case at bar will disclose that if all the competent evidence of caveators offered in chief on these issues be admitted as true, yet it would not constitute a case sufficient to go to the jury. The burden of proof on these two issues was upon the caveators, and if they failed to sustain the burden by their own witnesses at the close of their case then the trial court should as a matter of right give a peremptory instruction, for the caveators could not insist on cross-examining caveatee's witnesses in order to present evidence in chief to help out their own case.

Eleventh Error.

A motion was made at the end of caveators' case in chief to direct the jury to disregard the evidence in reference to the Altoona property, Golden Cross transaction, Gas Light, and Pennsylvania stock transactions' on the ground of immateriality and irrelevancy, which was overruled and an exception was noted (R., 38). The relevancy of this testimony has been heretofore discussed in this brief.

Twelfth Error.

At the close of caveators' case, caveatee renewed his motion to direct a verdict for caveatee on the issues of fraud and undue influence which was denied by the court and an exception was noted (R., 58).

Thirteenth Error.

The court told the jury if they believed that the relation of attorney and client existed between caveatee and testator at date of will, or at so short a time previous thereto that the relationship might still be in existence, or if they believed that any confidential relations existed between said parties, that the burden of proof was upon caveatee to show that no undue influence or advantage was used or taken in the making of the will, and that testator was treated with the utmost good faith (R., 58).

In considering this instruction the facts of the case must constantly be borne in mind. This will was in handwriting of testator (R., 33), executed without the presence of caveatee (R., 46, 48), who only aided by

introducing testator to one witness (R., 46), and caveatee did not know the contents of the will (R., 48), and was not the attorney for testator at the time of execution, and had not been for nearly a year previous (R., 47). The will was executed over six years before death of testator (R., 2, 3), and there was no evidence of an attempt to revoke it.

As pointed out by caveatee at the trial (R., 58), this instruction was objectionable, on two grounds, viz: (*a*) there was no evidence from which the jury could find relationship of attorney and client at date of will; (*b*) that proof of fiduciary relationship does not of itself, without more, shift the burden of proof.

(*a*) Outside of the testimony given by some of caveators' witnesses that they heard testator say caveatee was his attorney, which were indefinite as to time, and not proof of the fact (Throckmorton *vs.* Holt, 180 U. S., 552), there was no legal evidence as to the relationship of attorney and client between testator and caveatee except that given by caveatee. He said he was employed by testator in a certain transaction which was closed in September, 1899, and that he did not at any subsequent or prior time represent, counsel or advise testator in his business affairs or other matters professionally or otherwise (R., 47). There is no proof in the record to the contrary. No presumption of continuance of such relationship follows from proof of its existence, but even were this true it is clearly and positively rebutted by caveatee (R., 47).

(*b*) Does the proof of fiduciary relations of itself and

alone in case of a will shift the burden of proof upon the party charged with undue influence? It is respectfully submitted that it does not, and if the law applying to wills and to gifts *inter vivos* is clearly discriminated, the reason will distinctly appear. The latter is a rule of equity and does not pertain to the law of wills. (Tyson *vs.* Tyson, 37 Md., 583). But where there is an issue of undue influence, the law requires it either to be proved or requires evidence of some tangible facts, not merely a relationship, from which its existence may reasonably be inferred. Under the court's instruction the jury were practically told that caveatee would have to show that no advantage was used or taken in the execution of the will regardless of his knowledge or information of the circumstances. This doctrine, if consistently enforced in every instance of fiduciary relationship, would compel the legatee to explain the circumstances under which the will was executed, or it would be set aside. It will be noticed that the jury was not told to consider activity of caveatee in the execution of will, or the probability of caveatee, having secured for himself a benefit, or the possibility of his having dictated the will; but merely whether or not they found the fiduciary relationship to have existed, without confining themselves to any period of time. Had the jury found the relationship to have existed years before, nevertheless the caveatee would have had to assume the burden of proof. But such instruction is not in accord with the law as a consideration of the following authorities will show.

One of the best considered cases on this question is

(1890) Bancroft *vs.* Otis, 91 Ala., 279, which was a contest over a will on the ground of fraud, undue influence, and mental incapacity. There the proponent was the stepson, partner in business, residuary devisee, and executor of the will. The trial court charged that if confidential relations existed between testator and the principal beneficiary at the time of making will, then the burden of proof was shifted upon the principal beneficiary to satisfy the jury that the will was not produced by undue influence. The court in reversing the lower court said:

> "The proposition is that if, upon the contest of a will, it be shown that confidential relations existed between the proponent, he being also the principal beneficiary, and the testator, the law, without more, indulges the *prima facie* presumption that the testament was procured to be executed by him through the exercise of undue influence over the mind of the testator, and puts upon him the *onus* of rebutting this presumption, by affirmative evidence, that the testamentary act was not induced or procured by coercion or fraud on his part. * * * It is at once apparent that to the imputation of error to the lower court in the instructions referred to, it is essential that one, at least, of the former decisions of this court must be overruled, another limited, and yet another explained. * * * The doctrine of presumed undue influence against the dominant party, in transactions *inter vivos*, seems to us eminently sound and just. It proceeds, primarily, upon the natural assumption that a living person, having, it is to be supposed, a need for his

property, or, at least, a desire to retain it during life, will not part with it without a measurably adequate equivalent. Where it is made to appear that he has given it away, and that to one who occupies a position of domination in relation to him, the presumption still is that he has not freely deprived himself of it and its use and enjoyment, but that his act was induced by the undue exercise of the influence which the beneficiary is shown to have had over him; and this presumption must be met by the donee and rebutted, else, in equity, it becomes as a fact proven—a vitiating factor in the transaction. With respect to testamentary dispositions, the primary presumption, upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts *inter vivos* rests, is entirely lacking. They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be, with respect to them, no assumption that the donor would not voluntarily part with his property, since, in the nature of things, it must then pass from him to others, selected by himself according to the dictates of his affections, or appointed by the law of descents and distributions; and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality, that the property should cease to be his, and should become that of another. And the very considerations which lead to suspicion, which must be removed in transactions *inter vivos*—friendship, trust and confidence, affection, personal obligations may, and generally do, justly and properly give direction to testamentary dispositions.

Another very cogent reason for the distinction

recognized by the authorities between the two classes of transactions, with respect to casting the *onus probandi* on the issue of undue influence *vel non*, rests on the difference in the attitude which is sustained by a donee or grantee, on the one hand, and a devisee or legatee, on the other, to the act sought to be impugned. It is one of the leading principles of law in this connection that the burden of proof as to a particular fact is ordinarily upon the party who is in a position to know the truth in respect thereto, and is not, except in certain cases governed by rules which do not obtain here, imposed upon the party who is not supposed to have knowledge in the premises. Transactions *inter vivos* are necessarily transactions *inter partes*. The donee or grantee is present at the time of, or, at least, knows of, and accepts the donation or grant made to him. He, in the very nature of things, is in a position to know all the circumstances of the transactions, and to enlighten the court and jury in regard to them. To require him to do so, therefore, is in harmony with the general rule, and imposes no hardship on him. These reasons for the rule in respect to transactions *inter vivos*, do not obtain with respect to wills. The beneficiary is not a party to its execution, and may, in fact, know nothing of it for years after, nor indeed 'till the death of the testator, and, to quote Lord Penzance, to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence, or with what motive the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty upon him, which in many, if not most cases, he could not possibly discharge; and

would be, we may add, in many, if not most cases, to destroy a will, not because its execution was the result of coercion or fraud, but because a party who cannot be presumed to know the facts has failed to testify as to them. Other reasons might be enlarged upon for the distinction we are considering. We will content ourselves with a passing reference to one or two. The undue influence which will avoid a will must amount to coercion or fraud; ideas which involve actual intent to control the testator against his will. The law never presumes fraud, or the evil intent and unlawful acts essential to the coercion here contemplated. There must be some proof of these things. They cannot be considered to have power to coerce, or to defraud."

The court concluded its opinion by saying—

"that no such presumption can be predicated alone on confidential relations."

In a will contest where the issue was undue influence charged to parties who were on friendly terms with testator whose pecuniary embarrassments they had relieved were the beneficiaries under the will, the trial court instructed the jury that one standing in a confidential relation to testator, who is present at the execution or preparation of a will, and is largely benefitted by the will, must, from the mere fact of such presence, assume the burden of disproving the exercise of undue influence in procuring the will. The court holding this was error, said:

"The mere passive presence of such a person at the time and place of the execution of the will is

not sufficient to give rise to the inference of undue influence on his part, and to cast upon him the burden of repelling such inference by proof. To have that effect, in addition to the fact of being present at the execution of the will, there must be activity on his part in and about the preparation or procurement of the will, or other participation or agency in the proceedings leading to or resulting in the execution of the will as declared in the case of Bancroft *vs.* Otis. The giving of the charge was error."

(1893) Chandler *vs.* Jost, 96 Ala., 596, 607.

In a case where a will was contested on the ground of mental incapacity the question before the Appellate Court was: Where a will is contested on the ground of undue influence, and it appears the testator gave a large legacy to one who had long been his confidential adviser, and who was a stranger in blood, do such facts, alone, cast the burden of proof on such legatee to show that the will was not procured by undue influence on his part? The court said:

"Nor will the mere fact that the testator gave a legacy to one not of his blood, and who had been his confidential business agent, cast upon such legatee the burden of showing that the will was not made by his influence or procurement. This would be true even if such bequest should be held to indidicate that the will, in view of all the circumstances, was unreasonable in its provisions, which is not true in this case when all the facts are considered (cases cited). * * * No presumption can be held to arise because of such facts, alone, that the will does

not express the real intent of the testator. Undue influence is a defense to be established by the contestant. * * * Before the burden of proof can be said to be shifted to the proponents, in such a case, it must be shown that there is evidence sufficient and of such a character as to warrant the presumption that the will was not the free act of the testator, as in a case like that at bar, that the confidential agent and legatee was actually instrumental in the dictation and procurement of the execution of the will."

(1894) Denning *vs.* Butcher, 91 Iowa, 425, 38.

In a case of a will contest on the usual issues, the facts were that the residuary legatee, who prepared the will was testatrix's adviser in her financial affairs; that testatrix was a widow and quite old. The trial court held that these facts alone created a presumption that the will had been procured by his undue influence, and that the burden was upon him to rebut this presumption and to establish that in making this will the testatrix acted without restraint or undue influence. The court on review said this was error and held:

"Where contracts are made *inter vivos* which take effect presently, it is well established that if the party benefitted by such contracts occupies towards the other party a confidential relation, the court will presume that the contract was obtained through his fraud, and will put upon him the burden of proof, when it is attacked, that it was fair in all its parts, and was obtained by the exercise of no improper influence upon the other party to the contract. But in the case of wills no such rule exists.

In such cases the natural influence of the parent or guardian over the children, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy so long as the testator thoroughly understands what he is doing, and is a free agent. This distinction is so thoroughly established that it is only necessary to cite authorities in support of it. Parfitt *vs.* Lawless, L. R. (2 P. & D.), 462; Brick *vs.* Brick, 66 N. Y., 144; Matter of Lyddy, 5 N. Y. Supp., 636; Matter of Bedlow, 67 Hun., 408; Bancroft *vs.* Otis, 91 Ala., 279. Neither is it sufficient to establish that a will was obtained by undue influence, that the person accused of practicing it had an opportunity to do so, because the fact that such an opportunity existed does not raise the presumption that advantage was taken of it."

(1896) Matter of Spratt, 4 App. Div. N. Y., 1, 5.

The court held that an instruction was vicious which told the jury that if they believed from the facts admitted that the will was written by one of the devisees, who was a son of testatrix and who was appointed executor, and that testatrix could not read English, and that he had great influence over her and that advantage was given him under the will, then that the burden was cast upon him to show that the will was fairly obtained.

(1895) Berberet *vs.* Berberet, 131 Mo., 399–410.

The mere fact that the attorney, who drew the will, is named as one of the executors, to whom individually the testator's residuary estate is thereby bequeathed, is insuffi-

cient to create a presumption against the validity of the legacy on the ground of undue influence.

(1893) Matter of Edson, 70 Hun., 122.

In the case of Mackall *vs.* Mackall, 135 U. S., 171, which went up from this District, there was a confidential relationship between father and son resembling that of attorney and client, and the court said that while such relationships suggest influence, they do not prove undue influence.

In spite of some uncertainty and lack of harmony in the decisions, it is undoubtedly a sound rule, sustained by a majority of cases, that the existence of confidential relations between the testator and the beneficiary is not enough, *taken alone*, to raise a presumption of undue influence, if it also appears that the beneficiary was not active in procuring a benefit for himself. The presence of undue influence must be proved. It will never be presumed to exist without evidence of some facts from which its existence may reasonably be inferred. The mere fact that a person who, during life of the testator, occupied a confidential position towards him, is largely benefitted by the will, does not, *alone*, cast the burden of proof upon the proponent to show the absence of undue influence as to a legacy to that person.

Underhill on Wills, Sec. 145.

The facts that residuary legatees had occupied testatrix's house and cared for her and stood in fiduciary relations, and had the opportunity to exercise undue influence, coupled with liberal provisions in will for said

legatees, do not impose upon them the burden of showing that there had been no fraud or undue influence or raise a presumption that the will was the result of such undue influence.

(1893) McMaster *vs.* Scriven, 85 Wis., 162.

The mere presence of the chief beneficiary under a will at the time the will was signed is not evidence of undue influence, and is not improper, suspicious, or objectionable.

(1894) Delgado *vs.* Gonzales, Tex. Civ. App., 28 S. W., 459.

(1891) Ethridge *vs.* Bennett, 9 Houston, 295.

It has been held that the fact that the beneficiary was the guardian, attorney or trustee of the decedent, does not alone create a presumption against a testamentary gift, or that it was procured by undue influence. The mere fact that the proponent was the attorney of the testatrix did not, according to the authorities cited, create a presumption against the validity of the legacy given by her will.

(1884) Matter of Smith, 95 N. Y., 516–23.

(1861) Coffin *vs.* Coffin, 23 N. Y., 9, 13.

Undue influence is not presumed from the fact that the beneficiary stood in a confidential relation to testator.

(1893) Bernsee's Will, 71 Hun., 27.
Affirmed 141 N. Y., 389.

I am unable to find any authority for the contention

that where an attorney and counsellor drafts a will for his client and is himself named as a beneficiary, such act of itself raises any presumption of undue influence, but, on the contrary, the law requires something more than mere suspicion or opportunity. There must be some affirmative evidence of undue influence.

(1896) *In re* Read's Will, 40 N. Y. Supp., 977.

The fact that two of the beneficiaries in the will were the attorneys of the testator and drafted the will does not alone create a presumption that the bequests to them were procured by fraud or undue influence.

(1895) Clarke *vs.* Schell, 84 Hun., 28, 32.

Fourteenth Error.

The court in granting caveators' fourth instruction (R., 58) told the jury that if they believed the execution of the will was produced in whole or in part by act of caveatee, and that his action was part of a scheme whereby caveatee desired or intended to procure to himself the estate of testator in whole or in part, then such conduct of caveatee constituted a fraud in law, and their answer to the third issue should be yes (R., 58).

As pointed out by caveatee at the trial this instruction was objectionable on three grounds, viz: (*a*) that there was no evidence from which the jury could find that any act of caveatee in producing the will in whole or in part was part of a scheme whereby he desired or intended to procure to himself testator's estate in whole or in part; (*b*) that it was a peremptory instruction to

find for caveators without requiring jury to consider other circumstances justifying an adverse conclusion; (*c*) that the question of fraud was one of fact for jury, not of law for the court (R., 58, 9).

(*a*) The only evidence in this case relating to the circumstances of the execution of this will was given by one of the witnesses to the will and the caveatee. The former testified that the caveatee introduced witness to testator who asked him to be a witness, and they went downstairs without the caveatee and he was not present at time of execution (R., 46). The caveatee testified that he introduced the witness to testator and they went downstairs, but caveatee did not go and he was not present at the time of the execution; that caveatee did not prepare will, gave no advice in reference to it, and testator told him nothing in reference to its contents, except that he had always intended to deal equally with his two children; that he first saw it in office of Register of Wills after it was filed (R., 48). It is respectfully submitted that this evidence is not sufficient to justify the jury in arriving at the conclusion that there was fraud practiced. It is not sufficient to warrant the granting of such an instruction, because if the jury believed the witnesses, then they could not find the existence of fraud. If the jury disbelieved the witnesses, then in order to find fraud they must infer circumstances from facts not proven, and then infer fraud from that inference which would be a presumption deduced from a presumption, or an inference from an inference, which would be contrary to the rules of law (Davis *vs.* U. S., 18 App. D.

C., 496; Weaver *vs.* R. R., 3 App. D. C., 455; U. S. *vs.* Ross, 92 U. S., 281).

(*b*) This instruction as was pointed out to the court was also improper as it was peremptory to find for caveators without requiring the jury to consider all circumstances justifying an adverse conclusion. Thus the jury were told if they found the existence of the circumstances enumerated in the prayer that such circumstances positively established fraud, without suggesting that some facts might seemingly explain or satisfactorily justify caveatee's connection with the will. The presumption of fair dealing surrounds every transaction, yet the caveatee was denied it by this instruction. It is well settled in this jurisdiction that where a peremptory instruction is given to find for one party or the other, that the jury should be told to consider all facts warranting a contrary finding. This instruction did not measure up to that standard. The court in de Yturbide *vs.* Metropolitan Club, 11 App. D. C., 193, on that subject said:

> "Before an instruction can be granted that concludes with a direction to find the verdict for the party offering the prayer, it must be clear to the court that such prayer includes and requires the jury to consider every fact and circumstance in evidence that might justify an adverse conclusion; and that, upon the whole evidence thus presented, the adverse party has no right to the verdict in his favor. Prayers that conclude to the right of the plaintiff to recover, or against his right to recover, must not be of an abstract form, or founded only on

part of the evidence, but must be in a concrete form, and give full force and effect to every part of the evidence that is material, and may properly affect the result, whether produced by one side or the other."

In justice to the caveatee the jury should have been told that although they might believe caveatee took some part in the execution of the will, and desired or intended thereby to secure to himself a part of the estate, yet this would not vitiate the will if there was no fraud or undue influence and the testator knew what he was doing. Although the jury may have believed the caveatee schemed in some manner not proven by the evidence to get testator's property, yet if the testator was of sound mind and intended that caveatee should have it, there was no fraud practiced by the caveatee. If testator was not in fact deceived by the caveatee and was mentally capable he had the right to dispose of his property as he wished, and the jury should have been so told in connection with this prayer, for no fraud is practiced when the testator makes such disposition of his property as he chooses.

(*c*) The effect of the instruction was to tell the jury if they found the existence of the circumstances enumerated in the prayer, that such circumstances, in the mind of the court, positively established fraud practiced by caveatee, without reference to any fact that might seemingly explain or justify the condition; and the caveatee was deprived of his right to have the jury say whether such facts in their judgment con-

stituted fraud or fair dealing. Fraud is essentially a question for the jury, and the court should not say that if they find certain facts that such facts conclusively establish its existence. Could it be said, and the facts in this case would warrant such a finding, that if the caveatee had been asked to procure a witness for the will, and the will was executed beyond his presence, and he was made beneficiary thereunder without his knowledge, that such facts were conclusive proof of fraud? It is not within the province of the court by instruction to tell the jury that an ultimate fact, such as fraud, is established from the proof of certain evidentiary facts; such conclusion is always for the jury. It is not proper for the court to tell the jury that if they find certain facts, that such facts admit of only one particular construction. It is for the jury to draw their own conclusions from the evidence and say what it proves or does not favor (Hughes on Instructions, Sec. 181).

In a will contest, where the issues were fraud, undue influence and testamentary capacity, the trial court was asked to tell the jury that from confidential relations existing between legatee and testatrix, together with other facts touching the preparation and execution of the will, the law raises the inference, unless disproved, that the will was the offspring of fraudulent influence of legatee, and that such is a rule of law. This was refused, and on appeal the court said:

> "We think his honor properly refused to lay down such a rule of law, and that he would have committed error in so doing. * * * This in-

fectious (fraudulent) influence must be shown by those who allege that it has been successfully exerted in procuring the making of the will, and while it may be inferred from circumstances attending the transaction, the inference must be drawn by the jury from the evidence before them."

The court then quoted from a decision as follows:

"After proof of capacity and execution the common law lays down no rule upon the subject, but submits the general question to a jury for a decision according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper and assent thereto, under the comprehensive inquiry *whether a fraud has been practiced.* Where the testator's situation is such as to render the perpetration of a fraud, easily practicable, the jury may say they are not satisfied one has been practiced, and thence infer its existence, unless the contrary be clearly shown. * * * But those are conclusions of fact arising from evidence given or withheld. A defect of proof, unless it be a total defect, is for the consideration of a jury wherever the law requires the intervention of a jury."

After further reference to the relation between testator and beneficiary, the court proceeds to say:

"These considerations must satisfy the mind that upon such a subject the law cannot lay down as a test that a will is or is not valid, when executed under one or more of the particular circumstances mentioned, but necessarily refers the facts, upon which its validity legally depends, *to the decision of*

the jury under evidence as to all the circumstances attending its preparation or execution, the condition, mental and physical, of the testator, the contents of the instrument and the benefits provided in it for those actively concerned either in the preparation or execution. * * * This question is one of fact to be decided by the jury upon evidence which in the opinion of the judge is competent as tending to establish any of those facts. Its tendency, it is the province of the judge to explain, by stating what conclusions may be drawn from it; but whether it establishes a fact or whether a conclusion deducible from it is or is not rebutted by other evidence, is the province of the jury to say."

(1882) Horah *vs.* Knox, 87 N. C., 483.

In a will contest involving the issue of fraud the trial court instructed the jury that if they found certain facts enumerated in plaintiff's prayer that such facts amounted in law to a presumption of fraud. That instruction did not go as far as the case at bar for there the presumption was rebuttable, while in the case at bar the court said it was conclusive. The court, in declaring this instruction erroneous, said:

"But fraud in this case being a *question of fact* to be found by the jury, and not *one of law* to be inferred by the court, it was error to instruct the jury that the facts thus relied on by the plaintiffs created a presumption of fraud, or in any manner affected the burden of proof, which from the beginning to the end of this case rested upon the plaintiffs. * * * Whether the will and codicil were procured by fraud, were *questions of fact* to be found by

the jury, and not questions of law to be inferred or presumed by the court. The affirmative of the issue was upon the plaintiffs, and these instructions assume that if evidence is offered sufficiently strong to make out a *prima facie* case of fraud, the burden of proof was shifted to the defendants, and unless they offered evidence rebutting the *prima facie* case thus made the jury were obliged to find that the will and codicil were procured by fraud. The court thus undertook to say as matter of law that the plaintiffs had proved the affirmative, or, in other words, had proved that the will and codicil were procured by fraud, instead of leaving this question to be found by the jury."

(1878) Griffith *vs.* Diffenderffer, 50 Md., 466, 85.

In a case where a deed was executed by a parent to his child for love and affection the question was whether or not it was fraudulent as against creditors. The court below told the jury that, as the deed was voluntary, it was to be deemed in law fraudulent. The Appellate Court said:

"The judge erred in deciding as a *qu.stion of law* that the deed was fraudulent and void on the ground that it was voluntary. Whether fraudulent or not, was in this, as in all other cases, a question of fact for the jury. There is no such thing as fraud in law as distinguished from fraud in fact. What was formerly as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now but *prima facie* evidence, to be submitted to and passed upon by the jury."

(1831) Jackson *vs.* Timmerman, 7 Wend., 437, 38.

The court may charge as to the presumptions which the law by settled rule draws from given facts, but an inference of a fact, or the conclusion of the evidence of a fact from some other fact or facts is drawn by the jury who are the triers of the questions of fact. It may be proper for the jury in reaching a conclusion as to whether an assignment was made with a fraudulent intent to consider certain other facts, but the question of a fraudulent intent under such circumstances is one for the jury, and not for the court.

(1896) Mayer *vs.* Wilkins, 37 Fla., 244, 52.

Strictly speaking, there is no such thing as fraud in law. Fraud or no fraud is, and ever must be, a question of fact; the evidence of it may be so strong as to be conclusive; but still it is evidence, and as such must be submitted to the jury. No court can draw it against the finding of a jury.

(1826) Seward *vs.* Van Wyck, 8 Cow., 406, 35.

Fifteenth Error.

After the testimony was all in on both sides caveatee asked the court to instruct the jury to return a verdict sustaining the will on all the issues (R., 62). This was refused and an exception was noted. The questions relevant to this issue have been discussed elsewhere in this brief.

Sixteenth Error.

The error of the court in refusing caveatee's fourteenth instruction (R., 62) is not insisted upon on this appeal.

Seventeenth Error.

Caveatee asked the court to say to the jury that by the terms of the will the caveatee took no interest thereunder other than that of his commission as executor and trustee, and upon refusal an exception was noted (R., 62). It was explained to the court that this instruction was intended to obtain a construction of the will to meet caveators' contention, that caveatee took a fee simple interest under the will after lives or forfeiture upon contest, as referred to under instruction, No. 4 (R., 58). But the court refused the instruction stating that the will was before the jury as a piece of evidence, and it was for them to determine, without the court's instruction, as the construction of the will was not within the province of the trial court under the issues framed; that in a will contest the court could not construe the will for the jury (R., 62).

The refusal of this instruction resulted in caveators' attorneys submitting in argument to the jury the question whether or not the caveatee took a fee simple interest by the terms of the will, and whether or not, if the will were broken, the caveators did not forfeit to caveatee all their interest thereunder by reason of the contest. The affirmative of these propositions was maintained by counsel before the jury with great effect, and caveatee had no way of meeting these contentions in the face of the court's refusal of his instruction. The very terms of the will would, to a layman and juror, easily admit of the construction so cleverly placed upon it by caveators' counsel, and the harm and prejudice thereby entailed upon caveatee is in-

calculable. It would be easy to convince a jury from the language of the will that caveatee took a beneficial interest even though it be as executor or trustee, but in the case of Livingstone's Appeal, 63 Conn., 68, where a lawyer, who had for a long time been the confidential adviser of a testatrix, drew her will, and by it was made executor and trustee under it, it was held that he was not to be regarded as taking beneficially under the will, but only as accepting duties under it which the testatrix imposed. It is, therefore, submitted that the court erred not only in (*a*) refusing to construe the paper writing, but in (*b*) refusing to construe it as requested.

(*a*) According to the rules of evidence applying to common law jury trials " the construction of all written instruments belongs to the court " (Hamilton *vs.* Ins. Co., 136 U. S., 242, 55; Wigmore on Evidence, Sec. 2556). There seems to be no sound reason why the same rules should not apply to contested will cases as to the construction of the paper-writing itself. In this case, on the issue of undue influence, it was material for the jury to know what interest the caveatee actually took under the will in order to determine the probable motive for the exercise of undue influence. Likewise on the issue of fraud it was necessary to have the jury know with certainty what interest, if any, passed to caveatee, that they might more accurately determine caveatee's intent or desire. But as counsel on opposite sides disagreed as to the construction of the written instrument, should the jury have been allowed to construe it for themselves? Would it not be a dangerous practice to entrust lay-

men with the interpretation of a doubtful will? The reason the law imposes upon the court the duty of construing writings for the jury is that there may be settled rules by which written instruments may be interpreted. Were the construction of wills submitted to the jury no man could tell with certainty what terms to employ in devising his property, for the interpretation of one jury might be radically different from that which another might give the same document. But a still greater injury would be endured by such a practice, because a misconstruction by the court can be redressed by a bill of exceptions, but a misconstruction by the jury could never be reviewed, as the court above would have no means of knowing what construction the jury placed upon the will. Some authorities will be considered.

As a general rule the interpretation or construction of written instruments which are drawn in language so plain as not to require the aid of extrinsic evidence, is a question for the court, and it is error to submit it to the jury. The obligation of the court to expound the meaning of written instruments to the jury, and not to submit such questions to them, embraces every species of writings, contracts, records, deeds, wills and all others. This doctrine applies to wills, and all questions touching the operation, construction and effect of *testamentary writings*, are for the court, with the single exception that where there is a latent ambiguity parol evidence may be heard.

Thompson on Trials, Sec. 1065, 7, 9.

Upon an issue of *devisavit vel non*, where testator made a will contingent upon an event which came to pass, the trial court instructed the jury that the intention of testator in writing will regulated the construction of it, and if they believed from their construction of it that it was testator's intention that his wife should have his property, that they might find said paper to be his will. The court in holding this was error said:

> "The construction and effect of a will, or other writing, are questions of law to be decided by the court, and are not to be left as matters of fact to the determination of the jury. The only questions for the jury were, whether the paper was written by the deceased, and whether the event upon which its existence depended had happened. It was for the court to determine, by proper instructions to the jury, whether the paper was testamentary in its character, and whether it took effect absolutely, or only on a condition."
>
> (1866) Magee *vs.* McNeil, 41 Miss., 17–26.

Upon issues certified for trial by jury as to whether certain executors were mismanaging estate it was held that the court erred in its instruction to the jury that if more than one qualifies each is authorized to discharge the usual functions of an executor, but all must join in executing a special trust, "and I refer you to the will to ascertain whether it contains a special trust." The court said:

> "Whether the will contained any special trusts which required the joint action of all the executors,

was a question of law for the court to decide and not a question of fact to be referred to the jury for their decision."

(1868) Willson *vs.* Whitfield, 38 Ga., 269, 83.

All questions touching the operation, construction and effect of wills and instruments of writing, are for the determination of the court and not for the jury.

(1882) Burke *vs.* Lee, 76 Va., 386.

The court before whom the case was tried erred in declining to advise the jury, unequivocally, as to the proper construction of the will, upon which construction a material question in the case necessarily arose.

(1845) Green *vs.* Collins, 6 Iredell (Law), N. C., 139.

(*b*) The construction contended for by caveatee should have been given to the jury, because it is the interpretation indicated by the two methods recognized for the interpretation of writings, viz: first, the intention, as indicated by the language of will; second, what the testator actually meant by the use of such language.

First. The will was drawn by a layman (R., 33). The language clearly shows that the property was left to caveatée in trust to handle and manage, and disburse the proceeds as directed. "Subject to the obligation" means impressed with the duty—in legal phraseology, *in trust*,—to handle and to manage, and then to pay. The property was not given to caveatee absolutely, "but to be his absolutely" for this purpose only, viz: "to handle and to manage as he sees fit." The verbiage attempts to invest caveatee with all testator's title that

he may the more readily handle the estate in trust. This is emphasized by the further clauses of the will which give caveatee fuller authority to dispose of same unhampered.

But the most significant indication that the language was intended only to convey a trust estate is contained in the third clause, where testator requests the executor to purchase the mortgage on the Maryland farm if his son and daughter could amicably agree to a division of the same. This purchase cannot be harmonized with any theory of devising a fee simple interest to caveatee individually, and any construction embodying the fee simple theory makes sections two and three absolutely inconsistent. Construe the will as creating a trust estate and there is harmony throughout all its parts.

Second. What testator meant by the language was to convey a trust estate to caveatee to endure for the lives of the beneficiaries under the will and then to go to testator's heirs at law. This is manifest from the fact that one beneficiary was inclined by reason of his habits to squander his money, and testator desired to prevent the use and control of the other's interest by her husband. These were the sole objects of the trust creation. The fact that a fee is given to a trustee does not show testator's intention that the trust estate shall continue after the active duties connected with the trust have been accomplished (Page on Wills, Sec. 618). No technical language is necessary to the creation of a trust either by deed or will. It is not necessary to use the words "upon trust" or "trustee" if the creation of a trust is otherwise

sufficiently evident; and if it appears to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust. (127 U. S., 300, 10; Perry on Trusts, Sec. 82, 151, 8; 68 Ala., 420). A general devise to a trustee will create no greater estate in such trustee than is necessary for the purpose of the trust (Page on Wills, Sec. 618). The principle is now firmly settled upon the most indubitable authority, that the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or equivalent terms, but by the objects and extent of the trust upon which the estate is given (101 U. S., 782; 62 Md., 65). And as between a stranger and the heirs at law, every reasonable construction in a will must be made in favor of the heir at law, and he can be disinherited only by words clearly and necessarily producing that effect (Page on Wills, Sec. 467, and cases cited).

And caveatee's rights were further prejudiced by counsel for caveators contending that if the will were not broken that caveators forfeited all their interest under the will to caveatee. Had caveatee's prayer been granted no such contention could have been made, for under the law caveators could not forfeit their interests by this contest, for such provisions of forfeiture are absolutely null and void where there is no gift over as in the case at bar. Such conditions are said to be invalid because they are held to be *in terrorem*. Page on Wills, Sec. 683; Underhill on Wills, Sec. 511; Field *vs.* Van-

wyck, 94 Va., 563. As the court had refused to construe the will there was no way of meeting caveators' argument, and by this means counsel was not only allowed to argue the law to the jury, but to misstate it as well to the detriment of caveatee's interests.

Eighteenth Error.

The court was asked to tell the jury there was no evidence tending to show that said will was procured by fraud as distinguished from undue influence, and it was explained to the court that the object of this instruction was to inform the jury that there was no evidence to justify them in finding that the will was procured by fraud in the execution or inducement of execution (R. 62).

This instruction was necessary to explain and modify caveators' fourth instruction (R., 58) where fraud was defined by the court to be producing the execution of a will in whole or in part by the act of another whose action is part of a scheme whereby he intends or desires to procure to himself the estate of testator in whole or in part. Page on Wills, Sec. 123, defines fraud in the execution of wills to be of two kinds, viz: Fraud in execution, where a person is, by wilfully false statements of fact made to him with intent to deceive him and resulting in his actual deception, induced to execute an instrument of whose nature and contents he is ignorant. The latter consists of wilfully false statements of fact which are intended to and do induce testator to execute the instrument which he does execute with full knowledge of its nature and contents. Fraud in execution could not have been prac-

ticed because the will was in the handwriting of testator (R., 33), and no claim was made that he was induced by caveatee to execute this will without knowing anything about its contents. Nor is there any evidence, either direct or indirect, express or inferential, which even tends to prove that testator was induced to execute this will by false statements of fact as to its nature and contents. Therefore there was no evidence either of fraud in inducement or in execution, and the court should have so instructed the jury.

It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred (11 Howard, 373).

It is respectfully submitted that the order appealed from should be reversed.

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1873.

BURTON MACAFEE, APPELLANT,

vs.

MARY Z. L. HIGGINS AND ROSA LARCOMBE, APPELLEES.

BRIEF FOR APPELLEES.

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THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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Statement of Facts.

This is an appeal from a judgment denying probate of a paper propounded by the appellant Macafee as the last will and testament of J. Howard Larcombe, deceased. The paper bears date July 27, 1900, and Larcombe died December 12, 1906. A caveat was filed by Mary Z. L. Higgins, only living child of the said J. Howard Larcombe (Rec., p. 4). An answer was filed by Burton Macafee, denying, upon *information and belief*, the charges of fraud and undue influence made against him in said caveat (Rec., p. 6), and issues were framed presenting the questions raised by the caveat (Rec., p. 7). A trial was had, and verdict returned against the will on the three issues of fraud, undue influence, and mental capacity (Rec., p. 8). A motion by appellant for a new trial was overruled, and judgment entered on the verdict.

It is not deemed necessary to go into a statement of

the evidence on the issue as to the mental capacity of the decedent. That it was of a nature to require the submission of that issue to the jury was expressly admitted by counsel for appellant (Rec., pp. 38, 58). This admission was made both at the close of the caveators' case and at the conclusion of the whole evidence, counsel expressly advising the court in both instances that, while asking for the direction of a verdict on the issues of fraud and undue influence, he made no such request as to the issue of mental capacity. It may be noted, however, that Larcombe, at the time the paper bears date, was above eighty years of age, and the fact that he was weak and childish in mind and infirm in body is abundantly demonstrated by the evidence contained in the record.

On the issues of FRAUD and UNDUE INFLUENCE, the following facts are disclosed by the record:

First. That *the relation of attorney and client existed between the appellant and Larcombe at the time the paper purports to have been executed.* It was admitted by the appellant that he had been attorney for Larcombe in the latter part of 1899 in recovering certain stocks belonging to the estate of Larcombe's wife which were detained by one William A. Meloy, who had previously been Larcombe's attorney (Rec., p. 47); it was further admitted by appellant that he had acted for Larcombe in a transaction with the Pennsylvania Railroad Company, in January, 1900, the details of which he would not or could not disclose (Rec., p. 56); it was shown by the testimony of appellant's own witness, D. Fulton Harris, at a time practically coincident with the execution of the alleged will—July 27, 1900—that he (Macafee) was Larcombe's attorney and was attending to the latter's affairs and advising him (Rec., p. 41); and it further appears from Larcombe's letters (Rec., pp. 17, 47, and 51), one dated within ten days of the date of the alleged

will and the other the year following, that Larcombe was consulting appellant professionally and advising with him. The postal card (Rec., p. 47) is especially significant in this connection as showing upon its face that it was with respect to the very paper offered for probate that Larcombe wished to consult him. In addition to all this, there were the statements made by Larcombe to Peck (Rec., p. 15), Higgins (Rec., p. 18), Mrs. Rosa Larcombe (Rec., p. 16), and Mrs. Higgins (Rec., p. 19), admitted without objection, and tending to show that between Macafee and Larcombe the confidential relation of attorney and client existed. It is to be noted that no attempt was made by appellant to deny the statement of the witness Harris that he (appellant) had said *about the time of the Golden Cross transaction, which was between July 27 and August 11, 1900*, that he (appellant) was attorney for Larcombe.

Second. The *circumstances surrounding the execution of the paper writing.* Appellant admits that he knew of its execution and was advised by Larcombe that he had been named as executor; and that he procured at least one of the witnesses (Balinger) thereto. He told a remarkable story (Rec., p. 47) of the origin of this paper in the effort to relieve himself of responsibility in connection therewith, and one which the jury refused to credit. This in brief is his story: Larcombe was in his (appellant's) office while he was advising another client as to the making of the latter's will, in the course of which appellant referred to and quoted from Wheeler on Probate Law. After this client (who, to quote the facetious remark of the appellant, "is now reposing in Oak Hill Cemetery") left, Larcombe stated that he had thought of making a will and asked the loan of the book. Appellant was leaving for Pennsylvania to be gone some weeks and Larcombe requested him to notify him when he would return *so that the book could be returned.*

Affiant did so notify him, and in reply Larcombe wrote him the postal of July 17, 1900, ten days prior to the date of the alleged will. The record is silent as to any communication between appellant and Larcombe between that date and July 27, 1900. But on the latter date Larcombe comes to his office, states that he has drawn his will, has made him executor, and wishes him to witness it. Appellant informs him he can not be both executor and a witness, but offers to introduce him to witnesses, and does introduce him to R. Clinton Balinger. Appellant claims to have had no further connection with the execution of the paper, to have known nothing of its contents, and never to have acquired such knowledge until he read the will in the office of the Register of Wills after Larcombe's death.

The witness Balinger, when first examined as a witness to the paper, in making formal proof of execution, stated positively in response to questions asked him on cross-examination, that appellant had gone with Larcombe and himself to the office of Harris, another witness, and was present at the execution of the paper (Rec., p. 10). Subsequently, when called as a witness by the appellant, he states that Macafee was not present, but makes no attempt to explain his previous positive statement to the contrary.

Appellant's statement that he knew nothing of the contents of the paper until after Larcombe's death is contradicted by his own letter of June 6, 1906, found on page 29 of the record, in which occurs the expression: "*if he has not revoked that will it still stands.*" The appellant also offered in evidence certain pages from the book loaned Larcombe, but it will be impossible to find the language of the important parts of the paper in these pages, or indeed in the contents of the entire volume. Moreover Larcombe was a man of no legal training and the alleged will bears every evidence of having been

written by a lawyer. Furthermore, it appears that the alleged will was clandestinely or anonymously sent by mail to the Register of Wills after the death of Mr. Larcombe (Rec., p. 37). There was no reason for appellee sending the same in this suspicious manner and there was great reason for appellant doing so.

Third. The disposition of the property owned by Larcombe made by the said paper, when taken in connection with the facts above referred to as to the relations between Larcombe and appellant, and the latter's admitted part in its execution, becomes significant. The record discloses also that however secretive Larcombe may have been with others as to his affairs, he talked with the very greatest freedom to appellant about business and family matters—in fact that he reposed in appellant the greatest confidence.

Fourth. At the time the paper bears date Larcombe owned an undivided interest in real estate in Blair County, Pennsylvania, which he had held for many years; 9 shares of stock in the Pennsylvania Railroad Company; 26 shares of stock in the Washington Gas Light Company; 62 shares in Metropolitan Coach Company; was the holder of a benefit certificate for $2,000 issued by the United Order of the Golden Cross in which his daughter, Mary Z. L. Higgins was named as beneficiary; and had a life interest in a farm near Beltsville, Maryland. The fact is significant that, immediately upon the execution of the alleged will transfers began to be made to appellant, and these transfers continued at intervals until within about seventeen months thereafter the latter had acquired every dollar of property owned by Larcombe.

First in order was the naming of appellant as beneficiary in the Golden Cross certificate. On July 27, 1900, the same day on which the alleged will bears date, Larcombe applied for the issue to him of a new certificate

offered why this payment should have been made to appellant instead of to the attorney who, appellant says, drew the deed, nor why, if appellant in fact paid Larcombe at the time $750 in cash, a check should have been given by Larcombe for $13.25 (Rec., p. 55). Mrs. Higgins also testified, without objection, that her father had told her the transfer of this property to appellant was for convenience in adjusting the title to the same.

Thereafter, in December, 1901, appellant claims to have purchased the Pennsylvania Railway stocks, the Gas Light Company stock, and certain Metropolitan Coach Company stock, paying in the aggregate $2,784 *in cash* (Rec., p. 49). He gave in explanation of the payments in cash that Larcombe requested it, saying *that his daughter (Mrs. Higgins) went through his pockets and he did not wish her to find the check.* The only evidence that these payments were made was appellant's own testimony. No receipt was given nor any writing of any kind. But the fact is important that appellant claimed that when the certificates were endorsed by Larcombe and delivered to him he gave Larcombe a receipt for the same which he took up when the stocks were transferred to his name and payments made therefor; and these receipts, the only written evidence of the transfers, were not produced *and appellant could not say what had become of them.*

Appellant produced a letter from Larcombe dated December 19, 1901 (Rec., pp. 51 and 56), in which occurs the expression, "When I sold you the gas stock it was the last thing of market value I owned." It was claimed by the appellees that this letter was one prepared under the direction of appellant himself, and this is borne out by the following facts:

(1) It is dated December 19, 1901, whereas, by appellant's own testimony, the stocks were not transferred to him and payment made until some days thereafter,

certainly not before December 21, 1901, for the certificates were not put in appellant's name until then.

(2) The letter of Larcombe of April 5, 1903 (Rec., p. 52), shows that there was an agreement between Larcombe and appellant in relation to these stocks that did not contemplate a sale of them to appellant. If Larcombe was so heavily in debt that he had been compelled to sell these stocks to pay his debts, and an absolute sale had been made, what occasion was there for forewarning appellant of any inquiry on his daughter's part, saying that she knows "*nothing as to anything that has passed, or even that anything is between us.*"

(3) Larcombe was steadily in receipt of an income greatly larger than his expenses. The testimony shows that he regularly received from $1,400 to $1,600 a year in salary from the Government, and had additional income from these stocks and property, while his total expenses did not exceed $700 or $800 yearly. The witness Peck, who knew him intimately, as well as his daughter, with whom he lived from 1894 to his death, both testify to his closeness in money matters, Peck saying "he would neither borrow nor lend," and from his intimate knowledge of the man, saying he would not believe anyone who claimed to be his creditor. Although appellant testified that Larcombe stated in June, 1900, "his attorney had advised him to go into bankruptcy," no person was produced except appellant himself, to whom Larcombe was indebted to the extent of a farthing. The mortgage on the Maryland farm was made by his wife, who owned the property, and was not Larcombe's personal obligation, and was not paid off during his life.

(4) The record (pp. 25, 26, 27, 28 and 29) contains certain correspondence between the appellant and the caveator, Mrs. Higgins, and between appellant and Mr. Larcombe (Rec., pp. 32 and 33). These letters were written in May and June, 1906, while Mr. Larcombe was alive, and

did not thereafter "represent, counsel, or advise Larcombe in connection with his business affairs or other matters, professionally or otherwise" (Rec., p. 47), a denial that is absolutely disproved by his own testimony, not to speak of the testimony of his witness Harris (Rec., pp. 40 and 41), and of other witnesses and of the letters in the record, *and that he was not asked and did not deny specifically that he gave such advice to Larcombe.*

Sixth. Another significant fact reflecting on the credibility of appellant's testimony is that he presents a claim on account of notes and checks dated prior to the time he claims to have paid Larcombe for these stocks nearly $3,000, but can give no explanation why the amount was not deducted except that he did not think of it (Rec., pp. 54 and 56). This from the man who, in his settlement with Larcombe of the Meloy matter, received a due bill for $9 (Rec., p. 39), which was evidently taken up by the check of November 3, 1899, for $9.25.

To summarize, therefore, the following facts are shown in the record:

1. That, despite his denial to the contrary, the appellant sustained to Larcombe the relation of attorney prior to, at the time of, and for a long time subsequently to the execution of this alleged will.

2. That, despite his denial to the contrary, the appellant was consulted by and advised with Larcombe, and himself draughted the said paper writing, took an active part in, if not actually present at such execution—though that he was present is, we think, established—was familiar with its contents, and knew that he was himself the principal beneficiary under its provisions.

3. That appellant, immediately upon the execution of this paper, began to procure the transfers to himself by Larcombe of everything owned by the latter, which continued until his purpose was fully accomplished.

4. That appellant's claim that he paid value for these transfers of property, standing alone upon his unsupported testimony, is absolutely disproved by the facts and circumstances in evidence.

5. That the charges that Larcombe was wanting in mental capacity, and that the said paper was procured by fraud and undue influence practiced upon him by the appellant are abundantly established by the testimony.

ARGUMENT.

I.

It is well to bear in mind at the outset that the appellant at the close of caveators' case (Rec., p. 38) *conceded* that—

> "the case would have to go to the jury on the issue relating to *mental capacity*, and that he made no motion to direct a verdict on that issue."

Again at the close of the whole testimony (Rec., p. 58) counsel for caveatee stated—

> "that he made no motion to direct a verdict on the issue of *mental capacity*, as he supposed that there was sufficient evidence to go to the jury on that issue."

With this express and reiterated concession in the record and the jury having found against the will on the issue of *mental capacity*, it is submitted that the caveatee must show that material and prejudicial error was committed by the trial court in rulings with respect to that issue, if, indeed, he has not waived any such alleged error, otherwise the judgment must be affirmed

in them specific inquiries are made as to the several properties owned by Larcombe, all of which at that time were in appellant's possession, and not the least intimation is given that he claimed ownership in them. On the contrary, he endeavors to allay any suspicions. Instead of saying "Mr. Larcombe has sold his Golden Cross certificate to me," he says: "by an arrangement with your father I pay his Golden Cross assessments and dues." Instead of saying that he was owner of the land in Pennsylvania, and of the stocks, he implies that they are disposed of by Mr. Larcombe by a will in which provision is made "for your brother and your brother's family so that your brother could not, were he so inclined, as you say, squander what was thus provided. *If he has not revoked that will it still stands.* I do not believe any human being could have tried harder to be charitable and perfectly fair to his children than has your father, *and I do believe that, in time, you will both recognize this fact.*"

And when that letter was written the writer had in his possession every dollar that Larcombe owned! And is *now* claiming that he was *then* the absolute owner of all (Rec., pp. 48, 49 and 50). And although appellant professes the highest regard for Larcombe, and the letters of Mrs. Higgins made serious reflections on appellant and alleged that they were made upon her father's statement, no effort whatever was made by appellant to see Larcombe.

(5) Another fact may be noted: Larcombe, from the death of his wife, in 1894, lived with his daughter, Mrs. Higgins, receiving at her hands all care and attention. The summers were spent at the Beltsville farm, and the winters at her home in Washington. Larcombe paid no board, but paid the interest and taxes on the farm, and one-half the servant's hire of $7 to $10 per month, and the coal bill of about $35 for the winter months. The relations were apparently harmonious and agreeable, and

not until about the time of the execution of this alleged will, and until these transfers to appellant were in progress—in a word, not until appellant had become the dominating force in this old man's life—were these relations interrupted. For six years everything went smoothly, but practically coincident with the execution of this paper the appellant would have us believe that this old man, while receiving the benefit of his daughter's loving services, began to indulge in statements derogatory to her and her husband, to believe that he was being swindled by them, and in 1901, we find him *consulting with appellant* as to the preparation of a lease for the farm to be signed by his daughter and son-in-law (Letter of November 11, 1901, Rec., p. 51). Is it not a fair assumption from all the facts in the record that appellant himself suggested to Larcombe that Higgins should be required to pay rent—it is testified by Mrs. Higgins that her father told her *his attorney* advised him to get a lease or possession of the place (Rec., p. 19)—and that appellant, being in possession of everything else Larcombe owned, desired to possess himself of this life estate in the Maryland farm also?

Fifth. It appears from the record that Larcombe for years had an account with the Columbia National Bank, making regular deposits from month to month of small sums. As above stated, this account shows no record of the deposit of either the $1,090 or the $750 appellant claims to have paid him in November, 1900, and Jan. 11, 1901, though other deposits in small amounts were made about this time (Rec., p. 55). In August, 1901, this account was closed, and the witness Peck states that Larcombe told him this was on the advice of his attorney (Rec., p. 15). It is to be noted in this connection that appellant contented himself with a general denial that he had ever acted as attorney for Larcombe subsequently to the fall of 1899, when he attended to the Meloy transaction, and

did not thereafter "represent, counsel, or advise Larcombe in connection with his business affairs or other matters, professionally or otherwise" (Rec., p. 47), a denial that is absolutely disproved by his own testimony, not to speak of the testimony of his witness Harris (Rec., pp. 40 and 41), and of other witnesses and of the letters in the record, *and that he was not asked and did not deny specifically that he gave such advice to Larcombe.*

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With this express and reiterated concession in the record and the jury having found against the will on the issue of *mental capacity*, it is submitted that the caveatee must show that material and prejudicial error was committed by the trial court in rulings with respect to that issue, if, indeed, he has not waived any such alleged error, otherwise the judgment must be affirmed

irrespective of whether or not error was committed in the rulings of said court in regard to the other issues.

Morgan *vs.* Adams, 29 App. D. C., 198.
McDermott *vs.* Severe, 202 U. S. 600, 25 App. D. C., 276.
Glenn v. Sumner, 132 U. S., 152.
West *vs.* Camden, 135 U. S., 507.

We submit that by specifically conceding in the formal manner described that the case would have to go to the jury on the question of mental capacity appellant waived any error which might have been committed in respect to that issue in the admission of the evidence bearing thereon.

II.

And here it is proper to remark that the only assignments of error in respect to or affecting the issue of mental capacity are those numbered eight and nine.

1. The first of these relates to the question asked the witness Brooks on direct examination—

> "from what he observed of Larcombe would he say that in July, 1900, he was capable and was of sufficient mental capacity to understand and execute a valid deed or contract."

The objection was not to the form of the question, as leading, but simply "that this is a question for the jury to determine, and not for the witness" (Rec., p. 35).

In the first place, the record does not show that the witness answered said question (Rec., p. 35).

In the second place it is submitted that the question was entirely proper.

Section 1625, Code D. C., expressly provides as a condition to the making of a valid will that the person making it shall at the time be "of sound and disposing

mind and capable of executing a valid deed or contract."

This is the specific fact in issue on the question of mental capacity.

This question propounded to the witness Brooks, is identical in form with that propounded by counsel for caveatee to the subscribing witnesses to the alleged will, Balinger and Johnston; and is the form in use in commissions issuing from the Probate Court, as well as the very question which is asked of every subscribing witness to a will in making proof thereof.

In a case recently decided by this court the question propounded to the witness was "did you form any opinion as to whether he was *mentally capable of transacting business.*" The trial court declined to allow the opinion to be stated, but this court held that the opinion of the witness was admissible and it would have been error to have excluded it had the opinion, in fact, been offered.

Turner *vs.* A. S. & Tr. Co., 29 App. D. C., 460–469.

As to the right of a lay witness to express an opinion as to mental capacity of a party there can be no question.

Turner *vs.* Trust Co., 29 App. D. C., 460–467–468.
Conn. M. L. Ins. Co. *vs.* Lathrop, 111 U. S., 612–620.

In Turner *vs.* Tr. Co., 29 App. D. C., 468, this court said:

> "It would be impossible to make a rule declaring just what class of facts would show a sufficient foundation for the opinion of a lay witness concerning the mental capacity of a testator. The determination must depend mainly upon the circumstances developed by the examination of each witness, and therefore should be left largely to the wise legal discretion of the trial court; and its

> ruling in such cases should not be disturbed unless it clearly appears that it did not properly exercise such discretion."

It will be noticed that practically all of the cases referred to in appellant's brief on this point the question asked was whether or not the testator was *capable of making a will.*

2. The ninth assignment of error is to the refusal of the trial court to direct the jury to disregard the testimony of the witness Brooks that he would not say that Larcombe was, in July, 1900, capable and of sufficient mental capacity to understand and execute a valid deed or contract (Rec., p. 37).

This motion was made on the ground that it appeared from cross-examination of the witness that his opinion was formed in part from records in the Pension Bureau (Rec., p. 36).

(*a*) Counsel for appellee objected to the motion on the ground that it was not made at the proper time and came too late. The witness testified by deposition and no objection was made at the time of the taking of the deposition nor within ten days after the same was returned, as required by section 1058, Code, D. C.

Moreover, it is to be noted that the records to which the witness referred on his cross-examination were reports from the chief of the division in the Pension Bureau in which Larcombe was employed and which were required by law to be made and which came to the witness in his official capacity (Rec., p. 35 and 36). The chief of division was examined as a witness for caveators and his testimony (Rec., p. 13) was before the jury showing Larcombe's incompetence at the time to which the witness Brooks testified.

The record discloses also that the deposition was read to the jury without objection on the part of the

caveatee, and it was not until such reading had been concluded that the motion was made; and this, notwithstanding the fact that counsel for caveatee was present at the taking of said deposition and himself elicited on cross-examination the fact that witness' opinion was founded in part upon these records in the Pension Bureau.

(*b*) The objection is nothing more than an objection to secondary evidence. If the witness had been shown the records of the Pension Bureau (with which he was perfectly familiar) concerning Mr. Larcombe's record, at the time he was asked the question counsel for caveatee would not have contended that he could not express his opinion of Mr. Larcombe's mental capacity based upon his intimate acquaintance with him for years, his knowledge of his incapacity as an employee under witness, and the record showing that incapacity. The witness showed by his whole testimony the means of observation he had and his conversations and simply added that the records of the Pension Bureau showed the same thing.

If a party is present at the taking of a deposition and allows secondary evidence to be received without objection, he will not be allowed to raise the objection afterward.

Boykin *vs.* Collins, 20 Ala., 230.
Louisville R. Co. *vs.* Shires, 108 Ills., 617.
Cooke *vs.* Orne, 37 Ills., 186.
Dunbar *vs.* Gregg, 44 Ills. App., 527.
13 Cyc., 1020, and cases cited, note 83.

Moreover, an opinion of sanity from a lay witness is only improper where the witness does not describe the facts and circumstances on which he bases his opinion; and the witness Brooks having described fully to the jury his means of observation and his impressions, we can not see how any prejudicial error was committed,

even if part of his opinion was based on secondary evidence (his knowledge of the records in his custody) where no objection was made to the nonproduction of the records.

The admission of a deposition, though improper, as containing incompetent testimony, is not ground for reversal, especially where the verdict is sustained by competent evidence.

Fullam *vs.* Goddard, 42 Vt., 162.

McCrary *vs.* Deming, 38 Iowa, 527.

This is especially true in this case where appellant *conceded* that there was sufficient evidence to go to the jury on the issue of mental capacity and no motion was made by caveatee before the issue was submitted to the jury to strike out the testimony now objected to—that is, his motion was not renewed at the time this express concession was made.

III.

The first, second, fifth, sixth, and seventh assignments of error, relating to the evidence as to transfers made to appellant beginning immediately after the execution of the will, may be considered together. In their consideration certain facts should be kept in mind. At the time the evidence was offered it had been affirmatively shown—

1. That the relation of attorney and client had subsisted between appellant and Larcombe.

2. That appellant had taken an active part in the execution of the alleged will, had procured the witnesses, had gone with Larcombe and the witness Balinger to the office of Harris, where it was executed, and was present at its execution.

3. That appellant was the executor named in the will and himself the principal beneficiary under its provisions.

4. That Larcombe, on the 27th day of July, 1900, when the alleged will was executed, had the following property: The real estate in Pennsylvania, the stock in the Pennsylvania Railroad Company, the stock in the Washington Gas Light Company, his benefit certificate for $2,000 in the Golden Cross, and a life interest in the farm in Maryland.

5. That when the said will was propounded for probate appellant himself made oath to a petition which declared that Larcombe died practically penniless.

6. That appellant, though earnestly entreated by Larcombe's daughter, while Larcombe was yet alive, for information as to what had become of her father's properties, skilfully evaded replying, falsely held out the hope that her father's will would be satisfactory to all concerned, *though he knew then as well as he did when he filed the petition for probate* that Larcombe had no estate, and carefully concealed the fact that he was in possession of and claimed title to all the property.

7. That Larcombe for years prior to July 27, 1900, and subsequently, was in receipt of an annual salary of $1,400 to $1,600, was a man of simple habits, his expenditures not exceeding about $800 a year, was very close in money matters, and "would neither borrow nor lend."

8. That Larcombe was at the time 80 years old, feeble in body and mind, and reposed the utmost confidence in appellant as his attorney and confidential adviser.

9. That Larcombe's great desire was to so arrange his property that his son and son's family should be provided for.

10. That the transfers were in each instance made to appellant, Larcombe's attorney, the executor of this alleged will and his confidential adviser, and that not one dollar of consideration for any one of such transfers could be traced into Larcombe's estate.

11. That the first application for change of beneficiary in said Golden Cross certificate was executed by Larcombe on the same day as the alleged will before George J. Johnston, one of the witnesses to the will, as a notary public, in the very office in which said will was executed, and was practically a part of the *res gestæ* of the execution of the will; and that the second application was also executed in the same office before said Johnston as notary public.

With these facts in mind, was the evidence as to these transfers competent on the issues of fraud and undue influence? It is respectfully submitted that it was.

Olmstead *vs.* Webb, 5 App. D. C., 38.

The widest possible range of evidence is permitted to show fraud or undue influence.

Schouler, Wills, secs., 240–242.
1 Redfield Wills, sec. 51, p. 536.
Davis *vs.* Calvert, 5 Gill & J., 269.

Undue influence has always something sinister, corrupt, and selfish about it, when properly viewed, however sly and secret in its workings or varnished over with hypocrisy and hence difficult to be traced except in the effect it has produced.

Schouler, Wills, sec. 226.
Rollwagen *vs.* Rollwagen, 63 N. Y., 504.

But, even if its admissibility, on the evidence presented by the caveators, was a matter of doubt, all question of its relevancy and materiality was removed by the testimony of the appellant and of his witnesses Harris and Allen.

What part had appellant in the matter of the change of beneficiary in the Golden Cross certificate? Appellant's objection was that the evidence was irrelevant unless it

was proposed "to connect the caveatee with the said change or the preparation or execution of said papers." Appellant did claim that he had nothing to do with it, but his own witness Harris stated that appellant told him about the time of the application for change of beneficiary *that he was going to do something in connection with the papers for Mr. Larcombe*, but did not say what it was. At the same time Harris testified appellant told him he was Larcombe's attorney, was managing his affairs for him and advising him. Let the testimony of Harris be read in connection with the letters of Larcombe found on page 23 of the record, and it will be found impossible to escape the conclusion that the very "capable and painstaking lawyer" to whom Larcombe referred was none other than appellant himself. It appears also from an examination of the originals that the applications for change of beneficiary and the letter of August 11, 1900, referred to were written by the same hand, on the same typewriter, and all the circumstances in evidence point to appellant as the writer of them all.

Appellant claimed to have paid all assessments after the certificate was delivered to him early in November, 1900. That this statement was untrue is evidenced by the testimony of the witness Allen (Rec., p. 42) showing payments by Larcombe of assessments made in December, 1900, and February, 1901, *the latter payment being made in a check drawn to the order of appellant himself* and applied in payment of an assessment on said certificate.

The transaction with respect to the Golden Cross certificate was followed by the conveyance of the Pennsylvania property, and this in turn by the transfers of the stocks. At the very time appellant claims to have paid for the Pennsylvania property, Larcombe gave him a check for $13.25, which appellant says was to pay expenses of drawing deed, recording, and stamps. Let it

be borne in mind that appellant claims to have paid Larcombe $750 in cash, that he did not draw the deed, and that no trace of this $750 is to be found in Larcombe's bank account; and yet Larcombe draws a check to appellant to pay him, among other things, for a deed he did not prepare, but which was written, according to appellant, by a party employed by Larcombe.

Attention is invited to appellant's story of the alleged transaction as to the stocks. He claims to have paid Larcombe, who at the time was nearly 82 years old, nearly $2,800 in cash, no receipt being taken and no witness being present, and *forgets* to deduct money then due him from Larcombe. The only written evidence of the alleged transaction was not produced nor its absence accounted for. Appellant testified that when Larcombe delivered the certificates to him for transfer he gave him receipts therefor, *but does not know what became of these receipts.*

Further, it appears from appellant's own testimony that in each instance the certificates of stock, alleged to be purchased by him, were delivered to him endorsed by Larcombe, but were not paid for until after appellant had sent them to the companies and had the new certificates issued in appellant's own name. Did anyone ever hear of a stock sale where anything more was necessary than to turn over to the purchaser the certificates held by the vendor and endorsed by him? Why did appellant wait until new certificates were issued in his own name before paying (as he claims) for the stock?

The seventh exception, covered by the seventh assignment in error, was, in addition, waived by caveatee, who himself produced and offered in evidence on the cross-examination of the witness Ford, the deed from Larcombe to caveatee for the Pennsylvania property, and read the same to the jury, including the alleged receipt for $1,000 purchase money (Rec., p. 34).

The statement made by appellant was not offered as a declaration against interest, as counsel contends in his brief, but as an admission by appellant as a party to the proceeding.

IV.

The third and fourth assignments of error relate to the admission in evidence of correspondence between appellant and appellee, Mrs. Higgins—between the very parties to the suit—concerning the very property in dispute, and the paper writing propounded by appellant as the will of Mr. Larcombe. A correspondence which took place during the lifetime of Mr. Larcombe, and which throws a flood of light upon the transactions of appellant with deceased. Is anything more than this mere statement and an inspection of the letters necessary to show their admissibility.

They were certainly *material* and *relevant*, and the only other objection thereto was that the letters contained statements which might prejudice caveatee's case. They certainly ought to have prejudiced his case.

Here is a correspondence in which is disclosed that caveator charged caveatee with evading her inquiries concerning the Golden Cross certificate, the Pennsylvania property, and the stocks, and which plainly shows that appellant was evading answering (Rec., pp. 25, 26, 27, 28, and 29).

In the letter of June 9th (Rec., p. 29) appellant says: "By your father's arrangement, I pay his U. O. G. C. assessments and dues." This is his answer *then*, and *now* he is claiming that he was *then* the absolute owner of the certificate by purchase.

Any evidence, however slight, tending to prove fraud and undue influence, is admissible.

Olmstead *vs.* Webb, 5 App. D. C., 38.
Clark *vs.* Stansbury, 49 Md., 346.
Davis *vs.* Calvert, 5 Gill & J., 269.
Rollwagen *vs.* Rollwagen, 63 N. Y., 504.

As undue influence is generally employed surreptitiously, the evidence by which it is established is, in large degree, circumstantial, and the question of undue influence is especially one for the jury.

Towson *vs.* Moore, 11 App. D. C., 377–381.
Page on Wills, sec. 404.

Much less evidence is required to establish undue influence where the testator is of weak mind than where he is of average intelligence.

Reynolds *vs.* Adams, 90 Ill., 146.

And in the same letter (Rec., p. 29) appellant says:

> "Several years ago he (Larcombe) gave much thought and study to the matter of providing for your brother," etc. "*If he* (Larcombe) *has not revoked that will it still stands.*"

And appellant *then* knew what he afterward stated in his petition for probate of that alleged will, that he (appellant) was then possessed of every dollar's worth of Mr. Larcombe's property.

The objection covered by the third and fourth assignments of error was to the entire correspondence, not to parts of it. There can be no question as to the relevancy of the letters of appellant as they contain specific reference to the alleged will, and these letters were a portion of the whole correspondence.

V.

It is not deemed necessary to discuss the tenth assignment of error, inasmuch as the appellant, by proceeding with his testimony, waived the exception.

Mackey *vs.* B. & P. R. R. Co., 19 D. C., 282.

The eleventh assignment of error is disposed of in the discussion of the first, second, fifth, sixth, and seventh assignments of error under Section III of this brief.

VI.

Concerning the twelfth assignment of error, and in view of the express concession of appellant's counsel that the case would have to go to the jury on the issue of mental capacity and the jury's finding against the will on that issue, we submit that it is unnecessary to discuss the alleged errors in respect of the refusal of the court to withdraw the case from the jury on the issues of fraud and undue influence.

Morgan *vs.* Adams, 29 App. D. C., 198.

Nevertheless, it is respectfully urged that there is ample evidence in the record requiring the case to be submitted to the jury on the issues of fraud and undue influence and which entirely justifies the finding of the jury thereon.

Let it be borne in mind that we are dealing with the case of an old man above the age of 80 years, infirm in body and childish in mind, as to which class of cases the law is well settled that a less degree of evidence is required to support a verdict of undue influence and fraud than in the cases of persons of sound mind.

Yardley *vs.* Cuthbertson, 108 Pa. St., 395.
Moran *vs.* Sullivan, 12 App. D. C., 137.
Slater *vs.* Hamacher, 15 App. D. C., 558.

The evidence clearly establishes the fact that the relation of attorney and client existed between appellant and deceased at the date of the will. It is plainly shown to be so, by appellant's own testimony (Rec., pp. 47 and 56); by appellant's witness Harris (Rec., p. 41); by the postal card (Rec., p. 47).

The details and circumstances of the drafting of the

will and its execution in the building where appellant had his office; appellant's improbable story concerning the making of the will (Rec., pp. 47, 48 and 50) and the presence of appellant at the execution thereof; appellant's knowledge of the will; its clandestine delivery to the Register of Wills—all were pertinent facts to be submitted to the jury tending to show fraud and undue influence.

The disposition of deceased's property by the will and by the alleged transfers to appellant; his alleged payments in cash; and no cash disclosed in the possession of Mr. Larcombe; and the fact that these transfers commenced with the very date of the alleged will, and that within a few months after the date of the will deceased had been stripped of his entire estate which is now claimed absolutely by appellant.

And every one of these transfers would be, under the facts disclosed in this record, especially in view of the improbable story told by appellant, set aside without question by a court of equity, acting in accordance with the reiterated decisions of this court in Moran *vs.* Daly, 12 App. D. C., 137; Towson *vs.* Moore, 11 App. D. C., 377, and Slater *vs.* Hamacher, 15 App. D. C., 558, 578.

It is submitted that upon the facts disclosed by the record not only was it not error to refuse the instruction asked by appellant taking these issues of fraud and undue influence from the jury, but it would have been gross error to have granted it.

VII.

The thirteenth assignment of error relates to the granting by the trial court of the prayer requested on behalf of the appellee, dealing with the question of undue influence.

The objections to the granting of this prayer were (*a*) That there was no evidence in the case from which

the jury could find the existence of the relation of attorney and client at the date of the will; and (*b*) That proof of fiduciary relationship does not of itself, without more, shift the burden of proof.

(*a*) The first objection has been sufficiently answered in the statement of case and other portions of this brief. That appellant *was* the attorney of Larcombe at the time of the execution of the will is established by the circumstances surrounding such execution and by the testimony of appellant's witness Harris; and his own denial to the contrary, especially in the face of the many contradictions appearing in his own testimony, was entitled to no weight whatsoever.

Moreover, appellant himself testified that he was attorney for Larcombe in the Meloy transaction, concerning the recovery of the very stocks alleged by him to have been subsequently transferred to appellant by the deceased. This transaction occurred in the fall of 1899, a few months prior to the execution of the alleged will. He also admitted acting for Larcombe in some matters with Pennsylvania Railroad Company in January, 1900 (Rec., p. 56). The record fails to show that the relation thus established was ever terminated. Appellant states that Larcombe was frequently in his office about the time of the execution of the alleged will.

> "Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into action is not sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it."
>
> Dunn *vs.* Dunn, 42 N. J. Eq., 431.
> Dent *vs.* Bennett, 4 Myl. & C., 269.

(*b*) As to the second ground of objection to said prayer, it is respectfully submitted that upon the facts of this

case the burden *was* upon appellant to show the *absence* of *undue influence exercised by him.* He was Larcombe's attorney; procured witnesses to the will; was present at its execution; was the executor named therein, and the principal beneficiary under its provisions; and appellant's whole testimony was a studied attempt, in which he involved himself in many contradictions, to relieve himself from the onus which he recognized was imposed upon him by these facts.

This court has had occasion, in a number of cases, to pass upon the presumption arising from proof of the existence of confidential relations, where an advantage has accrued to the party in whom the confidence was reposed, and has uniformly held that it is incumbent on such party to show the fairness of the transaction drawn in question.

Towson *vs.* Moore, 11 App. D. C., 377.
Moran *vs.* Daly, 12 App. D. C., 137.
Murray *vs.* Hilton, 8 App. D. C., 281.
Slater *vs.* Hamacher, 15 App. D. C., 558.
O'Connell *vs.* Koob, 16 App. D. C., 161, 169.

Numerous authorities may be cited to the same general effect, among them the following:

Allore *vs.* Jewell, 94 U. S., 506.
Wilson *vs.* Mitchell, 101 Pa., 495.
In re will of Smith, 95 N. Y., 516, 522-3.
Bancroft *vs.* Otis, 91 Ala., 279, 291.
Underhill on Wills, sec. 145 and cases cited.

In Richmond's Appeal, 59 Conn., 226 (21 Am. St. Rep., 85 and *full notes*), it is held that the mere existence of a confidential relation will not in all cases necessarily raise a presumption of undue influence in the execution of a will, especially when it appears that the opportunity of familiar and secret communication and intercourse between testator and beneficiary, at a time proximate to

the execution of the will, is wanting; *but when a legacy is given to an attorney,* or other person, sustaining a confidential relation to testator, or when the person who prepares the will or *conducts its execution, not being a relative,* who would, in the absence of the will, be an heir, derives a benefit from its provisions, such presumption may arise from the surrounding circumstances which would justify the jury in finding undue influence existed in the absence of rebutting or explanatory proof.

When a person who drafts a will, or participates in procuring its provisions from the testator, also occupies a relation of special confidence towards him, and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the presumption of undue influence arises, and the burden of proof is on him to show that the will was executed freely and without his influence. In such case, direct and positive proof that the beneficiary took part in procuring from the testator the terms and provisions of the will is not required to raise such presumption, it may be inferred from surrounding circumstances.

Richmond's Appeal, 59 Conn., 226.

In Yardley *vs.* Cuthbertson, 108 Pa. St., 395, it was held that where it appears that testator was an aged man, that his mind originally strong had become impaired by disease, and that the instrument was prepared by a confidential adviser to whom the residuary estate was given to the great deprivation of heirs, the burden rests on such confidential adviser and beneficiary to show affirmatively that at the time of making said will, testator was informed of and knew the approximate amount of his estate and the proportionate amount which would pass to his confidential adviser by such residuary clause; and that the testator's mind was free from undue influence exercised by such adviser.

Moreover, the court, at the request of counsel for caveatee, gave five special instructions to the jury dealing with the question of undue influence (Rec., p. 59), which were read in connection with the instruction given at the request of counsel for caveators, and which stated the law on the subject more favorably to the caveatee than the facts of the case justified.

It is not understood how there can be any difference, on principle, in holding that the burden would be upon appellant in suit in equity to set aside the various conveyances to him from Larcombe and holding that such burden would be upon him to explain the bona fides of the transaction in reference to the procuring of this will.

In those cases holding that the burden of proving undue influence in procuring a will is upon the contestant, the reason given is that the beneficiary in the will may know nothing about the execution of the will, but when as in the present case, the beneficiary takes part in the execution of the will, knew of and accepted his appointment as executor—in a word knew all the circumstances of the transaction, the reason assigned for enforcing a different rule in regard to wills from that in cases of transactions inter vivos absolutely fails. The facts in this record make the execution of this will substantially a transaction inter partes.

VIII.

Appellant's fourteenth assignment of error relates to the granting of the prayer of the caveators numbered 4 (Rec., p. 58).

This instruction simply told the jury that, if upon consideration of *all the evidence* in the case, they believed the execution of the will was procured in whole or in part by the act of the caveatee, and that his action in that regard was part of a *scheme* whereby he desired or intended to procure to himself the estate of Larcombe in

whole or in part, this constituted fraud, and they should find against the will on that issue.

This instruction must be read in connection with that numbered 23 granted at the request of counsel for caveatee (Rec., p. 62).

If the caveatee *was* engaged in a scheme to procure for himself Larcombe's estate or any part of it, and in aid of that scheme procured by his own act the execution of the said will, was not his conduct fraudulent? When the relationship between himself and Larcombe, *as disclosed by the evidence*, is taken into consideration, the only possible answer to this question is that it was. Such being the case, was it error for the court to say so? It is respectfully submitted that it was not.

It is claimed by appellant's counsel that there was no evidence from which the jury could find that any act of appellant in procuring the will was a part of a scheme whereby he desired or intended to procure to himself any part of Larcombe's estate, but it needs only a careful reading of the testimony to show how baseless this claim is.

It is unnecessary to advert again to appellant's part in the execution of the paper. Certainly there was enough evidence to justify the jury in finding that he aided in procuring such execution. Now, did Larcombe know that by this will he was making appellant his principal beneficiary? Is it not apparent that such was not his intention? His desire was to safeguard his children's interest. This was known to appellant (Rec., pp. 29, 47). Significant in this connection is the attempt by appellant to show, from Larcombe's statements, that, at the very time he made this will and, *with the knowledge and consent of appellant*, named him as executor, Larcombe was bankrupt financially and had been advised to go into bankruptcy. If this were true, why should he be

desirous to "fix things so son-in-law Higgins shall not grab everything from my son."

It is submitted that appellant's conduct in respect to the execution of this will is to be interpreted by what followed. Read the story of the transaction with respect to the Golden Cross certificate—the abortive attempt to make it conform to the provisions of the will, followed by Larcombe's protest and the naming of appellant as beneficiary, and who can doubt that appellant led Larcombe to believe that the proceeds of that certificate would be applied by appellant for the benefit of Larcombe's children? Was not appellant named as executor by Larcombe, and were not these transfers of property made to appellant by Larcombe, in the belief *induced by appellant* that the latter would deal honestly by Larcombe's children. Not a dollar of consideration for any one of the transfers can be traced into Larcombe's estate, and we have only appellant's own word that he paid for them. *Where did he get the money?* He seems to have had a bank account for he sent checks for Larcombe *after the latter had been advised by his attorney the banks were not safe* (Rec., pp. 53, 56). No attempt was made by appellant to show that he had the amounts of these large payments to Larcombe—$1,090 at one time, $750 at another, nearly $2,800 at another—in bank to his credit at or about the time the payments were alleged to have been made. On the contrary, appellant's purpose, made apparent by his own testimony, was to cover up and conceal as carefully as possible any transactions had with Larcombe.

Now, with these circumstances in evidence, was it not a legitimate argument that appellant, at the very time the will was executed, had in mind that which thereafter occurred—in other words, that at that time he conceived the scheme of possessing himself of Larcombe's estate,

and these subsequent transfers were but the carrying out of that scheme?

Let it always be borne in mind that these transfers were not between parties dealing at arm's length, but between an old man and his attorney and executor, and further, that it is apparent from the record that appellant knew, when the transfers were made to him, that practically nothing was left for the will to operate upon.

IX.

The record shows that appellant's prayer, numbered 1 (Rec., p. 62), was refused by the court, and in appellant's brief he merely refers thereto under the fifteenth assignment of error.

This, with all of appellant's prayers, numbered 1 to 23, were offered immediately after appellant's counsel had notified the court (Rec., p. 58) that he made no motion for direction of a verdict on the issue of mental capacity, and having expressly conceded that the case would have to go to the jury on that issue, his first prayer was formally overruled with his consent.

We can not see how any error can be attributed to the court in refusing this prayer, in view of appellant's express concession, so far as it applies to the issue of mental capacity at least.

X.

The seventeenth assignment of error is to the refusal of the court to grant appellant's twenty-first prayer.

It would seem to be a sufficient answer to this assignment to say that the prayer does not correctly construe the will, even if such construction by the court were proper in a will contest. The terms of the alleged will were clearly opposed to the instruction requested.

In re Estate of Smith, 34 Wash. Law Rep., 197.

XI.

As to the eighteenth assignment of error in the refusal of the court to charge the jury that there was no evidence of fraud as distinguished from undue influence, it is submitted that the refusal was proper. The evidence bearing upon the issue of fraud has been discussed in other portions of this brief and need not be here repeated.

It is respectfully submitted that the judgment below should be affirmed.

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